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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-828

ALLENBERG COTTON COMPANY, INC.,
Appellant,

v.

BEN E. PITTMAN,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF FOR THE AMERICAN COTTON SHIPPERS ASSOCIATION AS AMICUS CURIAE

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INDEX TO BRIEF

	Page
AUTHORITY TO FILE	1
INTEREST OF THE AMERICAN COTTON SHIPPERS ASSOCIATION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
QUESTIONS PRESENTED	4
SUMMARY OF ARGUMENT—	
I. The Supreme Court has Jurisdiction to Hear this Appeal	5
II. Application of the Qualification Requirement and the Penalty Sanction Violates the Commerce Clause	7
PRELIMINARY STATEMENT	11
ARGUMENT—	
I. The Court Has Jurisdiction to Hear this Appeal	19
A. Appeal or Certiorari	19
B. The Effect of the Mississippi Supreme Court's Certification	21
C. The Mississippi Statute is a Hybrid of State and Federal Law, and Jurisdiction Exists to Decide the Federal Questions.	26
D. The Federal Questions was Timely Raised by Appellant in the State Court Proceedings	34
II. Application of the Mississippi Statutes to the Present Circumstances, Barring Appellant from ever Maintaining an Action to Enforce a Valid Contract, Violates the Commerce Clause of the Federal Constitution	40
A. Mississippi's Regulation of Foreign Corporations	46

B. The Issues Under the Commerce Clause 52
1. Analytical Framework 54
2. Defining Interstate Commerce Under Article I, Section 8 55
C. Determining the Validity of § 5309-221 and § 5309-239 Under the Commerce Clause 84
1. As Applied to This Case, § 5309-221 and § 5309-239 by Their Necessary Operation Unconstitutionally Impose a Direct Effect on Interstate Commerce 84
2. The Actual Effect of § 5309-221 and 249 as Applied Materially Burdens Interstate Commerce and Local Interests can be Promoted by Alternatives Which Affect Interstate Commerce Less Severely 93
CONCLUSION 100

Cases Cited

Adams Express Co. v. New York,
232 U.S. 14 (1910) 88
Beck v. Washington,
369 U.S. 541 (1962) 39
Bibb v. Navajo Freight Lines, Inc.,
359 U.S. 520 (1959) 92
Boddie v. Connecticut,
401 U.S. 371 (1971) 10, 43, 99
Brinkerhoff-Faris Co. v. Hill,
281 U.S. 673 (1930) 36, 39
Bruhn's Freezer Meats v. United States,
438 F.2d 1332 (8th Cir. 1971) 63

California v. Thompson,
313 U.S. 109 (1941) 91
Chassaniol v. City of Greenwood,
291 U.S. 584 (1934) 70
Chicago Bd. of Trade v. Olsen,
262 U.S. 1 (1923) 56
Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Co. v. Bay,
200 U.S. 179 (1906) 25
Cole v. Arkansas,
333 U.S. 196 (1948) 39
Cone Mills Corp. v. Hurdle,
369 F. Supp. 426 (N.D. Miss. 1974) 3, 6, 9, 11, 14, 72, 89
Consolidated Turnpike Co. v. Norfolk and Ocean View Ry. Co.,
228 U.S. 596 (1913) 24
Cooley v. Bd. of Port Wardens,
53 U.S. 299 (1851) 52, 85
Corn Products Refining Co. v. Eddy,
249 U.S. 429 (1919) 5, 7
Crutcher v. Kentucky,
141 U.S. 47 (1891) 27, 85
Dahnke-Walker Milling Co. v. Bondurant,
257 U.S. 282 (1921) 7, 33, 41, 59, 84
Davis v. Department of Labor,
317 U.S. 249 (1942) 41
Dean Milk Co. v. Madison,
340 U.S. 349 (1951) 10, 51, 97
Duckworth v. Arkansas,
314 U.S. 390 (1941) 53, 91
Dunn v. Blumstein,
405 U.S. 330 (1972) 97
Edelman v. Boeing Air Transport, Inc.,
289 U.S. 249 (1933) 72, 73
Eli Lilly & Co., Inc. v. Sav-on-Drugs,
366 U.S. 276 (1961) 27, 41, 74

Eureka Pipeline v. Hallanan,
257 U.S. 277 (1921) 33, 59, 82
Evansville-Vanderburgh Airport Authority District v. Delta Air Lines,
405 U.S. 707 (1972) 72
Evco v. Jones,
409 U.S. 91 (1972) 73
Federal Compress Co. v. McLean,
291 U.S. 17 (1934) 70
Ferguson v. Skrupa,
372 U.S. 726 (1963) 45
Flood v. Kuhn,
407 U.S. 258 (1972) 8, 10, 41, 44
Flournoy v. Wiener,
321 U.S. 253 (1944) 30
Freeman v. Hewit,
329 U.S. 249 (1946) 53, 74
Furst v. Brewster,
282 U.S. 493 (1931) 27, 64
Garrity v. New Jersey,
385 U.S. 493 (1967) 21
Gordon v. Lance,
403 U.S. 1 (1971) 100
Great Northern Ry. Co. v. Sunburst Oil and Refining Co.,
287 U.S. 358 (1932) 38
Heart of Atlanta Motel v. United States,
379 U.S. 241 (1964) 56
Herb v. Pitcairn,
324 U.S. 117 (1945) 24
Houston East and West Ry. v. United States,
234 U.S. 342 (1914) 56
H. P. Hood & Sons, Inc. v. DuMond,
336 U.S. 525 (1949) 92
Huron Cement Co. v. Detroit,
362 U.S. 44 (1960) 54

International Shoe Co. v. Washington,
326 U.S. 310 (1945) 9, 42, 48, 98
International Textbook Co. v. Pigg,
217 U.S. 91 (1910) 27, 67, 86
Joy Oil Co. v. State Tax Commission,
337 U.S. 236 (1949) 79
Katzenbach v. McClung,
379 U.S. 294 (1964) 52
Kosydar v. National Cash Register Co.,
42 U.S.L.W. 4767 (U.S. May 20, 1974) 10, 78
Lanza v. New York,
370 U.S. 139 (1962) 75
Lemke v. Farmers' Grain Co.,
258 U.S. 50 (1922) 33, 59, 74
Lynumn v. Illinois,
372 U.S. 528 (1963) 23
Martin v. Trout,
199 U.S. 212 (1905) 24
Missouri ex rel. Missouri Insurance Co. v. Gehmer,
281 U.S. 313 (1930) 5, 7, 36
Missouri ex rel. Southern Ry. Co. v. Mayfield,
340 U.S. 1 (1950) 29
Mitchell v. W. T. Grant Co.,
42 U.S.L.W. 4671 (U.S. May 13, 1974) . 10, 44, 87, 99
M/S Bremen v. Zapata Off-Shore Co.,
407 U.S. 1 (1973) 11, 45, 95, 99
Murdock v. City of Memphis,
87 U.S. 590 (1875) 5, 22
Myles Salt v. Bd. of Commissioners,
239 U.S. 478 (1916) 35
NAACP v. Alabama,
357 U.S. 449 (1958) 96
NAACP v. Alabama,
377 U.S. 288 (1964) 9, 96

Nashville, Chattanooga & St. Louis Ry. Co. v. Wallace,
288 U.S. 249 (1933) 72
National Labor Relations Bd. v. Jones & Laughlin Steel Corp.,
301 U.S. 1 (1937) 52
North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores,
42 U.S.L.W. 4035 (U.S. December 5, 1973) .. 45
Northwestern States Portland Cement Co. v. Minnesota,
358 U.S. 450 (1959) 72
Parker v. Brown,
317 U.S. 341 (1943) 53, 71, 91
Parker v. Lin-Co Producing Co.,
197 So.2d 228 (Miss. 1967) 27, 42
Perez v. United States,
402 U.S. 146 (1971) 71
Perkins v. Benguet Consolidated Mining Co.,
342 U.S. 437 (1952) 30, 45, 54
Pike v. Bruce Church,
397 U.S. 137 (1970) 10, 51, 89, 96
Powell v. Pennsylvania,
127 U.S. 678 (1888) 45
Raley v. Ohio,
360 U.S. 423 (1959) 22
Richfield Oil Corp. v. State Bd. of Equalization,
329 U.S. 69 (1946) 30
Robbins v. Shelby County Taxing District,
120 U.S. 489 (1887) 85
Robertson v. California,
328 U.S. 440 (1946) 91
Ross Construction Co. v. U.M. & M. Credit Corp.,
214 So.2d 822 (Miss. 1968) 27, 42
Saunders v. Shaw,
244 U.S. 317 (1917) 7, 35

Schollenberger v. Pennsylvania,
171 U.S. 1 (1898) 46
Shafer v. Farmers' Grain Co.,
268 U.S. 189 (1925) 64
Sioux Remedy Co. v. Cope,
235 U.S. 197 (1914) 67, 87
South Carolina Highway Department v. Barnwell Bros.,
303 U.S. 177 (1938) 92
Southern Pacific Co. v. Arizona,
325 U.S. 761 (1945) 46, 52, 60, 100
Southern Pacific Co. v. Gallagher,
306 U.S. 167 (1939) 73
Sprout v. South Bend,
277 U.S. 163 (1928) 69
Stafford v. Wallace,
258 U.S. 495 (1922) 59
Standard Oil Co. v. Johnson,
316 U.S. 481 (1942) 6, 31
State Bd. of Insurance v. Todd Shipyards,
370 U.S. 451 (1962) 41, 44, 72
State Tax Commission v. Van Cott,
306 U.S. 511 (1939) 6, 28
Street v. New York,
394 U.S. 576 (1969) 34
Swift & Co. v. United States,
196 U.S. 375 (1905) 56
Townsend v. Yeomans,
301 U.S. 441 (1937) 71, 91
Ungar v. Sarafite,
376 U.S. 575 (1964) 24
Union Brokerage Co. v. Jensen,
322 U.S. 202 (1944) 43, 80, 92
United Air Lines v. Mahin,
410 U.S. 623 (1973) 6, 30, 54
United States v. Carolene Products Co.,
304 U.S. 144 (1939) 100

United States v. Rock Royal Co-op., 307 U.S. 533 (1939) 57
United States v. South-Eastern Underwriters Assn., 322 U.S. 533 (1944) 52
United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942) 57
Western Union Telegraph Co. v. Kansas, 216 U.S. 1 (1910) 85
Wickard v. Filburn, 317 U.S. 111 (1942) 52
Willson v. Black-Bird Creek Marsh Co., 27 U.S. 245 (1829) 52

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Miscellaneous

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Statutes

Mississippi Code Ann. Sections:
1437-76 ..... 4, 97
5309-221(e) 4, 26, 54, 84
5309-225 4
5309-226 4
5309-230 4
5309-239 ..... 4, 26, 84
5309-312 4
5345 4
5346-76 ..... 4, 49
9697(i) 4, 80

7 U.S.C. §3 ..... 59, 94
7 U.S.C. §1341 41
7 U.S.C. §1621 ..... 12, 94
7 U.S.C. §1622 12
7 U.S.C. §2101 ..... 41, 59, 94
7 U.S.C. §2301 94
28 U.S.C. §1257 19

87 Stat. 221 14

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-628

ALLENBERG COTTON COMPANY, INC.,
Appellant,

v.

BEN E. PITTMAN,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF FOR THE AMERICAN COTTON SHIPPERS ASSOCIATION AS AMICUS CURIAE

AUTHORITY TO FILE

This brief of the American Cotton Shippers Association as *amicus curiae* in support of the position of Appellant Allenberg Cotton Company is filed with the consent of the parties. This consent was received by telephone from Mr. George C. Cochran on behalf of Appellee Pittman and from Mr. John McQuiston II on behalf of Appellant Allenberg. Mr. Cochran and Mr. McQuiston agreed to furnish James F. Blumstein, counsel for *amicus*, written consent prior to the submission deadline, pursuant to Rule 42(2),

and such written approval will be filed with the Court upon receipt.

If such written consent does not arrive by the submission deadline, *amicus* requests that this be treated as a Motion for Leave to File, pursuant to Rule 42(3). The American Cotton Shippers Association submitted a brief as *amicus curiae* in support of Appellant's Jurisdictional Statement and wants to present its views on the merits to the Court on behalf of its members.

INTEREST OF THE AMERICAN COTTON SHIPPERS ASSOCIATION

The American Cotton Shippers Association is a trade association of cotton merchants, shippers and exporters of raw cotton. The association was founded in 1924 and is incorporated under the laws of the state of Tennessee. The association is authorized to cooperate and treat with Cotton Exchanges, Cotton Shippers Associations, Cotton Buyers Associations, Cotton Manufacturers Associations, Compresses, Gins and individuals in the United States and in any foreign country in evolving rules, regulations and practices governing the cotton trade which shall be fair to all concerned; and is authorized to engage in all such activities in connection with the cotton industry as come within the province of a trade association including the right to sue and be sued by the corporate name.

The 492 members of the association derive their status through membership in one of five federated associations, such associations doing business in sixteen states throughout the cotton belt:

Arkansas-Missouri Cotton Trade Association
Atlantic Cotton Association
Southern Cotton Association

Texas Cotton Association
Western Cotton Shippers Association

Of the total U.S. cotton crop the member firms handle over 70% of the raw cotton sold to domestic textile mills and export 80% of the U.S. crop sold in foreign markets. Four cooperative marketing associations and textile mill buyers control the remaining portions of these markets.

The involvement of members of this association in the purchase and sale of cotton directly involves them to a substantial degree in the transacting of business in interstate commerce. Any possible ruling that directly affects the continued orderly transacting of the business of the members of this association is a matter of concern to the American Cotton Shippers Association. Its interest in this case is therefore manifest, and it therefore requests leave of this Court to file this brief as *amicus curiae*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The lower court used statutory references to Mississippi Code 1942 Annotated, and *amicus* has used the same referencing. However, the Mississippi Code was recompiled and renumbered in the Mississippi Code 1972 Annotated. For the Court's convenience, *amicus* sets forth herein the corresponding reference sections, especially since the court in *Cone Mills Corp. v. Hurdle*, 369 F. Supp. 426 (N.D. Miss., 1974), an important intervening case, uses the 1972 Code numbering.

1942 Code (1972 Supp. where applicable)	1972 Code
§ 1437	§ 13-3-57
§ 5309-221(e)	§ 79-3-211(e)
§ 5309-225	§ 79-3-219
§ 5309-226	§ 79-3-221
§ 5309-230	§ 79-3-229
§ 5309-239	§ 79-3-247
§ 5309-312	§ 79-3-289
§ 5345	§ 79-1-27
§ 5346	§ 79-1-29
§ 9697(i)	§ 27-31-1(i)

STATEMENT OF THE CASE

The facts of this case are adequately detailed in Appellant's Jurisdictional Statement, pp. 3-12, and Appellant's Brief. *Amicus* will therefore refrain from restating the facts herein.

QUESTIONS PRESENTED

1. WHETHER THIS COURT HAS JURISDICTION TO HEAR THIS APPEAL?

   a. WHETHER THE CERTIFICATE OBTAINED IS THAT OF THE MISSISSIPPI SUPREME COURT OR OF THE PRESIDING JUSTICE ONLY, AND IF OF THE COURT WHETHER IT IS CONCLUSIVE ON THIS COURT?

   b. WHETHER THE MISSISSIPPI QUALIFICATION STATUTE INCORPORATES THE FEDERAL CONSTITUTIONAL DEFINITION OF INTERSTATE COMMERCE, THEREFORE MAKING IT A HYBRID OF STATE AND FEDERAL LAW AND NECESSARILY RAISING THE FEDERAL QUESTION IN ITS CONSTRUCTION BY THE MISSISSIPPI SUPREME COURT?

   c. WHETHER IN VIEW OF THE CIRCUMSTANCES THE CONSTITUTIONAL QUESTION WAS EXPLICITLY RAISED IN A TIMELY MANNER UNDER THE RULE IN *MISSOURI EX REL. MISSOURI INSURANCE CO. V. GEHNER*, 281 U.S. 313 (1930) OR *CORN PRODUCTS REFINING CO. V. EDDY*, 249 U.S. 429 (1919)?

2. WHETHER THE TRANSACTION BETWEEN BUYER AND SELLER OF COTTON WAS IN OR AFFECTED INTERSTATE COMMERCE?

3. WHETHER, IF IN OR AFFECTING INTERSTATE COMMERCE, SUCH TRANSACTION NECESSARILY OR BY ITS EFFECT VIOLATED THE COMMERCE CLAUSE?

SUMMARY OF ARGUMENT

I. The Supreme Court Has Jurisdiction to Hear This Appeal

The law of federal jurisdiction concerns the distribution of power between the states and the federal government. Federal courts do not review federal questions that are not drawn in question in state courts because of fear that decision by the federal courts may intrude on state power to resolve state law questions. *Murdock v. City of Memphis*, 87 U.S. 590 (1875).

(a) But where a state court actually decides a federal question, it would be counterproductive and violative of the policy of federal-state comity if the federal courts questioned the propriety of the state court's reaching the federal question. That is a matter for the state courts themselves to resolve. Similarly, it is apparent that the federal courts should accept the statement of the state

court that it actually reviewed the federal question. The certificate is a device that has been used to clarify ambiguous records and opinions of state cases, but this Court has given the same deference to state court certificates that it has to state court opinions, and indeed to do otherwise would defeat the very reason for federal restraint.

In this case, counsel for Allenberg sought a certificate from the state supreme court, and the court issued such a certificate in language closely paralleling a certificate found in the leading Supreme Court practice book. While signed by the Presiding Justice, the certificate states that it is modifying the court's order to include the statement in the certificate. This Court should accept the certificate for what it says it is and for what counsel explicity sought —a certificate by the state court and not of a single justice. As a certificate of the court, it should be conclusive on this Court that the federal question was considered by the state supreme court.

(b) Mississippi law exempts transactions in "interstate commerce" from the general qualification requirement for foreign corporations. This exemption reflects a mandatory limitation on state power imposed by the Commerce Clause and therefore uses the federal concept as its own referent. The Mississippi statute therefore adopts and incorporates the federal meaning as a necessary element in construing its own statute. *See Cone Mills Corp. v. Hurdle*, 369 F.Supp. 426 (N.D. Miss. 1974). *Cf. United Air Lines v. Mahin*, 410 U.S. 623 (1973). When the Mississippi Supreme Court declined to apply the statutory exemption respecting transactions in interstate commerce to the transactions herein, it was necessarily making a determination that the statute was valid and that the federal Commerce Clause was no impediment to such application. *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942); *State Tax Commission v.*

Van Cott, 306 U.S. 511 (1939). *See Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States* §99 (Wolfson and Kurland ed. 1951); Greene, *Hybrid State Law in the Federal Courts*, 83 Harv. L. Rev. 289 (1969).

(c) In normal situations, a litigant must raise the federal question prior to the petition for rehearing. If, contrary to Appellant's contention, it be concluded that no federal question were presented or decided prior to the petition for rehearing, that would still be timely in the circumstances of this case. Under the doctrine of *Saunders v. Shaw*, 244 U.S. 317 (1917), and *Missouri ex rel. Missouri Insurance Co. v. Gehner*, 281 U.S. 313 (1930), a litigant is not required to anticipate deprivation of constitutional rights or to seek explicitly to protect them in advance of their actual deprivation. Allenberg won its lawsuit in the trial court, which found Allenberg exempt from the qualification requirement. It was the decision of the Mississippi Supreme Court that resulted in the actual infringement on federal Commerce Clause interests, and Appellant raised this point at the earliest time in the petition for rehearing. The federal question in such circumstances is timely raised. *Cf. Corn Products Refining Co. v. Eddy*, 249 U.S. 428, 432 (1919).

II. Application of the Qualification Requirement and the Penalty Sanction Violates the Commerce Clause.

(a) The underlying transaction herein is covered by the terms of *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921). In *Dahnke-Walker* a purchase was made by an agent of a foreign corporation in Kentucky for shipment to Tennessee. This Court held that the purchase as well as the actual transportation constituted interstate commerce and held invalid the state's qualification requirement in its application. Allenberg is a cotton merchant

whose business is the facilitation of interstate commerce in cotton. The market for cotton is worldwide, and it is universally recognized that the market for agricultural commodities most closely resembles the classical market structure. Congress has confirmed this reality and the national interest in maintaining a smooth operating and privately run market system in cotton. It has adopted in legisiative findings the concept of commerce embodied in *Dahnke-Walker* and related cases that encompasses the negotiation, purchase, and sale as well as the actual transportation of the cotton out of state. The findings of Congress should be accorded great weight, and this Court should be very wary of interfering with a pattern of commercial development fostered by *Dahnke-Walker* and subsequent state and federal legislation adopting its concepts. *Cf. Flood v. Kuhn*, 407 U.S. 258 (1972).

(b) The nature of the Mississippi statutes as applied herein impermissibly intrude on the Commerce Clause. It is inconsistent with the free trade concept embodied in the Commerce Clause that a state be able to require a foreign corporation to secure a license to transact interstate commerce within its borders. Requiring a certificate of authority for interstate transactions manifests a restriction on interstate commerce at war with the precepts of a national marketplace and assured access to local markets for interstate commercial activities. *Dahnke-Walker* and its progeny state explicity that the nature of such a regulation violates the Commerce Clause.

Moreover, the statute is uneven in its application to Mississippi residents and to foreign corporations. Contracts entered into by foreign corporations are not void, but merely unenforceable by the foreign corporation. On the other hand, if a Mississippi resident seeks to maintain a bargain, he can sue on the contract. This is the kind

of parochialism that fosters retaliation and recrimination among states and undermines the free trade area foreseen by the Founding Fathers and certainly a major reason for our national prosperity today.

(c) The actual effect of the Mississippi statutes in their application herein is to unduly burden interstate commerce. The state's primary interest is in protecting its citizens against fraud by overreaching foreign corporations. The qualification requirements were designed to provide accountability to local citizens by establishing a basis for acquiring jurisdiction. *NAACP. v. Alabama*, 377 U.S. 288, 305 (1964); *Cone Mills Corp. v. Hurdle*, 369 F.Supp. at 431. But since *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), wherein the "minimum contacts" doctrine was formulated for purposes of allowing state jurisdiction over foreign corporations, all states have adopted long arm statutes. See Note, *Foreign Corporations—State Boundaries for National Business*, 59 Yale L.J. 737 (1959). Mississippi has a long arm statute and a specific provision for permitting service on local agents of foreign corporations. §§1437, 5346 Miss. Code 1942 Ann. Since Allenberg could easily have been served, the interests of the state are somewhat diminished.

Moreover, the Mississippi statute, unlike the Model Business Corporation Act from which it is adopted and unlike the vast majority of other states, requires that a foreign corporation have qualified at the time the contract is actually made in order for it to maintain an action in state court. This is obviously a severe penalty which can no longer be justified in light of modern rules of service of process and jurisdiction. See Note, *Foreign Corporations: The Interrelationship Between Jurisdiction and Qualification*, 33 Ind. L.J. 358 (1958). By absolutely barring foreign corporations from state courts, the Mississippi law also promotes

extra-judicial remedies of a kind frowned upon by this Court in *Mitchell v. W. T. Grant Co.*, 42 U.S.L.W. 4671, 4677 (U.S. May 13, 1974), and infringes on the foreign corporation's interest in access to a judicial form, an interest this Court recently has declared to be basic. *Boddie v. Connecticut*, 401 U.S. 371 (1971).

The existence of alternatives which are less intrusive on the federal interstate commerce interest must be considered and balanced in determining whether application of a state statute will be held unduly burdensome on the Commerce Clause. *Pike v. Bruce Church*, 397 U.S. 137, 142; *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951). The existence of broad jurisdictional statutes and the possibility of a curative provision indicate that the state's interest is not sufficient when balanced against the overriding federal interest in the free flow of commerce.

(d) The commercial reliance on *Dahnke-Walker* and the specific equities in this case preclude modification or overruling of *Dahnke-Walker*. In *Flood v. Kuhn*, 407 U.S. 258 (1972), this Court indicated its unwillingness to interfere with commercial relationships that had developed in reliance upon a decision of this Court. Congressional and state legislation have reinforced the institutionalization of the doctrine of *Dahnke-Walker*, and modification of that rule would cause unwarranted commercial disruption in an area already too uncertain. *Cf. Kosydar v. National Cash Register Co.*, 42 U.S.L.W. 4767 (U.S. May 20, 1974) (need for a rule justified otherwise "mechanical" approach).

Moreover, in this particular case, affirming the judgment of the Mississippi Supreme Court would be the utmost in irony. A rule that is supported because of its prevention of fraud is used by a contract breacher to defeat an otherwise valid commercial obligation, freely bargained for and without any evidence of fraud on the part of the

foreign corporation. Allenberg and others similarly situated stand to lose thousands of dollars directly into the pockets of those who renege on "solemn contracts", *Cf. M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-13 (1972), and then justify their refusal to deliver under the mask of protecting Mississippians against fraud. This is casuistry of the first order; it seeks to justify refusal to enforce contracts for a broader good when the reality is that only Pittman will gain an unjustified windfall profit with this Court's sanction. This is, therefore, scarcely the case in which to reconsider basic doctrine.

PRELIMINARY STATEMENT

"When money speaks enticingly, listeners become litigants." *Cone Mills Corp. v. Hurdle*, 369 F.Supp. 426, 429 (N.D. Miss. 1974). These words, written by Federal District Judge Orma Smith in a cotton contract reneging case, sum up what has happened in this and all too many similar cases currently in litigation throughout the cotton-growing region. Judge Smith took judicial notice of his own docket to "observe that literally scores of suits have been filed to either enforce or rescind advance or forward contracts for the sale and delivery of cotton fiber." *Id.* The reasons for the massive impetus to break cotton contracts relate to market conditions and to the decision of the Mississippi Supreme Court now under review.

As Judge Smith found, the price of raw cotton fiber on world markets "rose in a sudden and spectacular fashion" in 1973. Weather conditions, unprecedented foreign and domestic demand, dollar devaluation, and related factors combined to cause the market price to more than double within a six month period. *Id.*

Because of this striking rise in the market price, some cotton growers have been unable to resist the corrupting

urge for immediate gain. Impelled by the short-sighted desire for windfall profits, and unmindful of the staggering consequences of contract breaching on other blameless parties, this defendant seeks to undermine a recently developed course of dealing that holds the promise of long-run stability for cotton producers and others in the cotton trade. By reneging on contractual obligations to deliver cotton at harvest time—agreements entered into at arm's length and freely bargained for—defendant, and others like him, threatens the economic welfare of an entire industry. Moreover, his action, if successful, may subvert recent federal government initiatives in promoting self-reliance in the cotton trade and increased exports to markets overseas. The failure of these governmental efforts naturally could have the most serious and widespread economic effects since all Americans share in the miseries brought on by runaway inflation and recurring balance of payments. The contribution of the agricultural sector is especially noteworthy, with the rising sales on international markets. *See* 1970 U.S. Code Cong. & Admin. News 4792.

Defendant's actions may have far-reaching consequences. Since the end of World War II, the United States Government has actively sought to improve marketing procedures for agricultural commodities. Congress has declared that "a sound, efficient, and privately operated system for distributing and marketing agricultural products is essential to a prosperous agriculture and is indispensable to the maintenance of full employment and to the welfare, prosperity, and health of the Nation." 7 U.S.C. §1621. Accordingly, Congress directed the Secretary of Agriculture to conduct programs "designed to eliminate artificial barriers to the free movement of agricultural products," 7 U.S.C. §1622 (d), and to foster new and expanded markets (domestic and foreign). 7 U.S.C. §1622(e). Unhappily,

however, for more than twenty-five years, cotton marketing was characterized by heavy reliance on governmental supports for crop surpluses. As Mr. Kenneth E. Frick, administrator of the U.S. Department of Agriculture's Agricultural Stablization and Conservation Service has stated, by acquiring and holding stocks of cotton at taxpayer expense for long periods of time in Commodity Credit Corporation (CCC) approved warehouses, the government has been performing an inventory function for the trade and has been serving as a market for farmers for more than a generation.

Guaranteed government price supports generated cotton surpluses stored in CCC warehouses. The government sought to curtail planting as part of its support program in order to reduce overall production. But in recent years, the surplus or carryover of cotton has diminished to the point where government sought to increase output. The government, consistent with its emphasis on a successful, privately operated market system, encouraged production by cotton farmers on acreage not subject to federal price supports. Cotton produced on other than allotted land, however, was grown at the farmer's own risk. The approach very clearly "put a greater reliance on the marketplace" and sought to "bring agriculture production in line with the demands of the marketplace" 1973 U.S. Code Cong. & Admin. News, p. 1757.

This program went into effect for the 1971 crop year, and before planting their crops many farmers sought a method for reducing this risk while at the same time assuring themselves additional, reasonable profits. As a means of protection against price declines from the increased production, especially since government supports would be unavailable for unallotted acreage, many farmers turned to a new type of contractual agreement, the "forward" contract.

> By forward contracting, a grower agrees to sell his future crop before it is planted or soon thereafter. A capable farmer can virtually assure himself a profit even before planting. If he is unable to negotiate a price which he anticipates will be profitable, he may plant other crops which are in demand or simply allow his land to lie fallow. Thus, in theory at least, forward contracting will help restore traditional principles of supply and demand to the cotton market with the added feature that the element of risk is reduced.
>
> The grower, moreover, can borrow on forward contracts and textile mills can price their finished product long before manufacture. Forward contracting also enables the retail merchant to determine the price of an article manufactured from cotton months in advance.

Cone Mills Corp. v. Hurdle, 369 F. Supp. at 430.

As the private market functions more smoothly, the need for constant federal government tinkering diminishes, the burden on taxpayers dwindles, and the Congressional goal of an efficient "privately operated" marketing system is more nearly attained. But the continued success of the forward contracting device depends on mutuality of trust and reliance on the strict adherence to contractual obligations. Realizing the desirability and importance of forward contracting for cotton growers, especially under the new farm law, 87 Stat. 221, cotton producer organizations have stressed that producers and merchants must be able to rely on each other's commitments if contracting is to succeed as a viable marketing tool. The demise of forward contracting because of reneging and unenforceability could even affect the level of U.S. exports since foreign countries seem to place great weight on the American reputation for fulfilling contractual responsibilities, or at least upholding contractual rights in court.

The financial consequences resulting from the mass refusals to deliver are severe enough, but consider also the possible impact on American foreign policy interests of judicial sanction for mass contract breaching. Suppose, for example, that the plaintiff in this situation were not an American corporation "foreign" to Mississippi, but instead a Japanese firm (a lot of cotton from Marks, Mississippi went to Japan, A-60) a mainlaind Chinese buyer, Korean, Dutch, or English purchaser. Imagine the international repercussions of allowing each state to interfere with enforcement of admittedly valid contracts by denying access to the legal process to good faith foreign purchasers. The ultimate embarrassment to the United States of such a situation is clear evidence of the wisdom of the traditional court-imposed limitations on state action in the field of interstate and foreign commerce.

In 1971, 11% of the United States upland (i.e., grown in the southeastern United States) cotton crop was forward contracted. The contract between Appellant Allenberg and Appellee Pittman was signed in January, 1971 and applied to Pittman's 1971 crop when harvested. During 1971, cotton prices rose, and by harvest time in November, 1971, the Pittman cotton was worth some $18,000 more than the contract price; Pittman refused to deliver.

In 1972, the practice of forward contracting became more widespread, with 32% of the United States upland cotton crop sold in advance of harvest. U.S. Dept. of Agriculture, *August 1 (1973) Crop Report* (Aug. 9, 1973) p.2. But the market for cotton declined during 1972 so that forward cotton contracts entered into in February, 1972, for example, brought an average price of 30.27 cents per pound while farmers who waited until harvest time in October, 1972, received an average price of 25.56 cents per pound. *Statistics on Cotton Related Data 1930-1967, Supplement*

for 1972, U.S. Dept. of Agriculture Economic Research Service (Feb. 1973, Statistical Bulletin No. 417) p. 85. The 1972 experience evidently persuaded even more farmers to contract ahead for sale of their crop for over half the 1973 crop was forward contracted, with the percentage in the Delta region (including Mississippi) above 70%, U.S. Dept. of Agriculture, *Cotton Situation* (Nov. 1973), CS-263, p. 9.

The market price for cotton, as previously noted, skyrocketed in 1973. Prior to the harvest season, the Mississippi Supreme Court sent shock waves throughout the cotton-growing region when it decided the present case, reversing the trial court and holding that an out-of-state cotton broker could not enforce concededly valid forward cotton contracts. This decision and the 1973 market situation placed in jeopardy the validity of contracts for more than *one million* bales of cotton produced and forward contracted in Mississippi. Coming in April, the decision provided a basis for optimism among short-sighted and venial producers that they could renege on their freely bargained for, arms-length contracts, and rely on the assistance of the Mississippi courts to deny enforcement to foreign corporations which, relying on state law and direct Supreme Court precedent in *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921), had not obtained a certificate of authority to do business in Mississippi. Responsible producers and producer organizations, recognizing the importance of maintaining the viability of the forward contract and realizing the reliance placed on the contract price by others in the cotton trade, urged compliance with the contracts; but all too many farmers sought to capitalize on the short-run windfall opportunity, heedless of the harm caused the buyers in the near term and themselves in the long term if the forward contract technique became suspect.

The cotton program of the government for 1974 is based upon a 1973 change in the law. 87 Stat. 221. The new program places an even heavier emphasis on the use of the marketplace and further government withdrawal from direct subsidy, unless a specified target price for cotton is not achieved. A cornerstone of this policy is that farmers be able to forward contract so as to reduce their risk if they wish. The greater reliance on forward contracts is, thus, a pillar of federal policy. Yet, continued uncertainties about the validity of these contracts diminishes their value and popularity. If a foreign corporation not qualified to do business in Mississippi must run the risk of expensive litigation on a contract, it is unlikely to enter into one. Inevitably, this will place a considerable burden on those in the business to qualify in all cotton-producing states; but it will also keep out of the market foreign corporations unable or unwilling to qualify because the amount of business they do in a particular state does not warrant it. Or it could deter a new entrant into the marketplace (e.g. a Japanese corporation) from buying in a state.

The United States balance of payments situation can ill afford the imposition of insular qualification requirements on a state by state basis where the effect may well be reducing the ease with which prospective buyers enter the American agricultural marketplace. Moreover, imposition of state by state qualification requirements for interstate cotton transactions would allow highly capitalized and big-volume brokers and buyers to gain a protected position in the cotton market, with excessively concentrated power. This would inherently open up the opportunity for abuses, such as artificially controlled supply and lower prices for individual farmers, by limiting the number of potential purchasers of his produce.

Finally, it is important to understand precisely how the forward contract operates in an individual situation.

The Allenberg-Pittman transaction involved in this case adequately demonstrates the commercial consequences of a breach of contract. The most important point to bear in mind is that Allenberg stood to gain nothing from the improved market price for cotton between planting and harvest. Allenberg makes commitments to furnish cotton at a specified future time at a certain price. The terms of this commitment reflect the market situation at the time the contract is made. By the time of harvest, Allenberg has long since committed itself to delivering the cotton it has agreed to buy from farmers.

In reality, Allenberg is in the same situation as the farmer, having committed itself to sell at a low market price while the price went up. But Allenberg's contractual obligation must be met. If it cannot enforce its original contract with the farmer, then Allenberg must purchase spot cotton at the time it must deliver. The $18,000 price differential in this case comes directly out of Allenberg's pocket as a disruptive business loss. Quite on the contrary for Pittman, his planning and commitments, like Allenberg's, were all based on the lower price; enforcement of the Allenberg-Pittman contract will bring about no dislocation for Pittman as a result. This is therefore not a case of which party will benefit from a fortuitous rise in price—that is, among competing claimants for windfall gain. Rather, this is a case where one party (Pittman) seeks windfall profit by saddling the other party (Allenberg), which had already locked itself into a commitment based in good faith on the deal with Pittman, with substantial out of pocket, disruptive losses. Moreover, if the price of cotton had declined, the contract under Mississippi law would be entirely enforceable by Pittman against Allenberg. Miss. Code 1942 Ann. §5304-234. This is important background in understanding the commercial realities among the parties as well as the institutional interests in a "sound, efficient

and privately operated system for distributing and marketing agricultural products . . ." 7 U.S.C. §1621.

ARGUMENT

I. THE COURT HAS JURISDICTION TO HEAR THIS APPEAL

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2), which permits appeals from final judgments of the highest court of a state "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . and the decision is in favor of its validity." While it has been argued that "[i]f there is any area of the law which should be crystal-clear, it is the jurisdiction of the Supreme Court of the United States," Wolfson and Kurland, *Certificates By State Courts of the Existence of a Federal Question*, 63 Harv. L. Rev. 111 (1949), this clarity, unfortunately, has not always been attained.

A. *Appeal or Certiorari*

The critical question here is whether Allenberg drew in question the constitutionality of the Mississippi statute as applied so as to justify the exercise of appellate jurisdiction by this Court. As an initial matter, there is an issue whether the "validity" of a state statute is sustained within the meaning of §1257(2). When the state court holds the statute applicable to a particular set of facts as against a contention that such an application is invalid on federal grounds. Citing *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1971), Stern and Gressman argue that such a state court decision—the kind under review here—does fall within the jurisdictional statute:

> This is true even though the statute on its face bears no federal impediment. Thus where the court holds that

a particular transaction is intrastate rather than interstate commerce and that on such basis the state statute may be applied and enforced, the validity of the statute has been sustained as to those facts.

R. Stern and E. Gressman, Supreme Court Practice (4th Ed.) 85 (1969) (hereinafter cited as *Stern and Gressman*).

Of course, *Dahnke-Walker* is a case heavily relied upon by Appellant with respect to the merits of this Cause; its jurisdictional significance is especially important also because, upon reargument, the Court found an appeal the appropriate method of review.

It is possible, however, that this Court could construe Appellant's claim in such a way that certiorari rather than appeal would lie. Appellant's jurisdictional Statement (p. 2) requests that the papers be treated as a petition for certiorari as is authorized by 28 U.S.C. §2103, if certiorari would be the appropriate mode of review under §1257(3). Were appellant's claim viewed not as a challenge to the validity of the Mississippi statute as applied to the specific facts herein but rather taken as a claim of exemption from application of that statute because of the federal rights under the Commerce Clause, then certiorari would be appropriate. *Stern and Gressman* 85-87. Analyzed this way, the Mississippi Supreme Court's decision amounts to a denial of Allenberg's assertion of a federal Commerce Clause right, not a validation of the Mississippi statute. In such a situation, certiorari would be the appropriate method of review. Admittedly, the lines of demarcation here are somewhat difficult to follow; moreover, the distinctions should not ultimately affect this Court's determination to hear this cause. For the reasons amply demonstrated in Appellant's Jurisdictional Statement, this case in any event is "certworthy" and, even if review be discretionary, such discretion should be exercised to grant review on the

merits. This procedure has been adopted where the Court has postponed the question of jurisdiction to a hearing on the merits. *Stern and Gressman* 90. See *Garrity v. New Jersey*, 385 U.S. 493, 496 (1967).

B. *The Effect of the Mississippi Supreme Court's Certification*

"The mechanism of law—what courts are to deal with which causes and subject to what conditions—cannot be dissociated from the ends law subserves. So-called jurisdictional questions treated in isolation from the purposes of the legal system to which they relate become barren pedantry. After all, procedure is instrumental; it is the means of effectuating policy. Particularly true is this of the federal courts."

F. Frankfurter and J. Landis, The Business of the Supreme Court 2 (1928). The law of federal jurisdiction concerns the distribution of power between the states and the federal government. Unless viewed from this perspective, this field is "surely a sterile topic." *Hart and Wechsler's, The Federal Courts and the Federal System* (Bator, Mishkin, Shapiro, Wechsler ed.) (1973). Unfortunately, the law regarding the form and effect of state court certificates is somewhat opaque and smacks of the "barren pedantry" criticized by Frankfurter and Landis.

From §1257(2) and §1257(3), it is clear that a precondition for the exercise of Supreme Court jurisdiction is that the federal issue be "drawn in question" in the state courts. This represents a jurisdictional rule of federal comity for the orderly procedures of state courts. In the exercise of its appellate jurisdiction, the United States Supreme Court should not review claims not presented to the lower court whose final judgment it reviews. Naturally, in some cases, like this one, there will be ambiguity about

whether the federal question entered into the decision of the state court. The Mississippi statute and the Mississippi Supreme Court decision both refer to "interstate commerce," but neither states definitively whether this concept is identical with the federal constitutional concept. Moreover, the Mississippi Supreme Court did not explicitly state whether it considered the force of the federal Commerce Clause in its decision.

Cognizant of this ambiguity, Allenberg's counsel sought to clarify the situation by asking the state court to certify whether or not it had considered and decided the federal question. This certification procedure arose as a practical response to cases where the specific grounds of decision by a state court were ambiguous. It reflected a rational, common sense compromise that would both preserve state hegemony over state issues, see *Murdock v. City of Memphis*, 87 U.S. 590 (1875), and allow federal review of federal questions when appropriately raised in state proceedings. If federal-state comity and power distribution were the primary concerns, then it was reasonable for the United States Supreme Court to defer to the judgment of the state court if the state court certified that the federal question had been considered or raised. This deference is consistent with the desire to avoid federal intrusion on state court prerogatives. When the state court says it considered or decided a federal issue, there can be no concern of federal overreaching.

This Court's approach to cases in which state courts actually decide a federal question conforms to the general policies just described. This Court routinely refuses to examine whether a federal question was properly raised in state court proceedings when the highest state court assumes or holds that a federal question was properly before it. "There can be no question as to the proper

presentation of a federal claim when the highest state court passes on it." *Raley v. Ohio*, 360 U.S. 423, 436 (1959). This Court then considers it irrelevant to the exercise of its jurisdiction how or when the federal issue was raised in the state courts. "An irrebuttable presumption is created that the federal question was timely and properly raised." *Stern and Gressman* 127.

This Court's refusal to challenge a state supreme court's judgment about its own processes reflects the same sense of comity that underlies federal refusal to decide state law issues. It is not the business of the United States Supreme Court to challenge the propriety of a state supreme court's decision to consider or decide a federal question. Indeed, a contrary rule could promote federal-state disharmony.

The rule of deference that has grown up with regard to state court decisions considering or deciding federal questions has direct applicability to state court certifications. There is no reason for this Court to scrutinize such a certificate in any greater detail than it does a state court opinion. As two commentators have stated, the rule should be "that a certificate of a state court is conclusive as to whether a federal question has been raised and decided," Wolfson and Kurland, *Certificates By State Courts of the Existence of a Federal Question*, 63 Harv. L. Rev. 111, 117 (1949). Regardless of the means through which a state court speaks on this issue, its certification that it considered or decided a federal question should be conclusive.

This approach now has been adopted as a rule by this Court. For example, in *Lynumn v. Illinois*, 372 U.S. 528, 536 (1963), the Court declined to search beyond an Illinois Supreme Court certification that the decision of the federal claim was necessary to its judgment even though

a prior rule of Illinois procedure required that the constitutional claim be raised at trial. *Lynumn* is therefore a complete rebuttal to the point raised in Appellee's motion to dismiss or affirm that Allenberg failed to raise a constitutional claim at trial, a matter discussed in further detail below. See Motion to Dismiss or Affirm, p. 6, n. 4. See also *Ungar v. Sarafite*, 376 U.S. 575, 582-83 (1964) (New York Court of Appeals' amended remittitur held determinative); *Herb v. Pitcairn*, 324 U.S. 117, 128 (1945).

If the effect of a state court certification should be and is determinative when it states that a federal question was timely raised or decided, the next question is what form that certificate must take. The early case of *Martin v. Trout*, 199 U.S. 212 (1905), one of the first cases in which the state court certificate technique was used, distinguished between a certificate from the court and one from a single justice. 199 U.S. at 222-24. Some language in *Consolidated Turnpike Co. v. Norfolk and Ocean View Ry. Co.*, 228 U.S. 596 (1913), indicated that formal entry in a journal would be a distinguishing characteristic, but the Court in that case went on to assume that the certificate was from the state court and dismissed because of an adequate, independent state ground. The reason to distinguish between a court certificate and that of a justice is rational enough: any single judge may not share the same understanding of a case as do his brethren. But determining whether a certificate reflects a statement of a court and therefore its judgment on a case must be done with full understanding of the reasons for concern. There should be flexibility and deference to state court procedures, and counsel should be able to rely on the certificate he solicits from the state court.

In this case, counsel for Allenberg applied to Justice Powell for an extension of time so that he could "secure a

certificate from the Supreme Court of Mississippi" that the federal question had been timely raised. Counsel's application to Justice Powell cited *Lynumn v. Illinois*, 368 U.S. 908 (1961), in which the certification procedure was used. Moreover, the certificate of the Mississippi Court very closely parallels the language of the certificate held sufficient in *Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Co. v. Bay*, 200 U.S. 179, 182 (1906), to establish that the federal question was timely raised and necessarily considered. This is hardly an accident since the standard Supreme Court practice book, *Stern and Gressman*, sets this certificate out as a model in its forms section (p. 676). See also language from *Lanza v. New York*, 370 U.S. 139, 142 n. 6 (1962), cited in *Stern and Gressman* 677.

Allenberg presented its application to the Mississippi Supreme Court. The certificate was expressly made a part of the judgment and entry of reversal. It recites that the court considered and decided the federal question on appeal and in the petition for rehearing. Moreover, the state Supreme Court clerk certified that the Certificate was an order that appeared of record on file in her office. Under these circumstances it would be exalting form over substance to hold the certificate inadequate. Counsel for Allenberg conscientiously followed the path set out by this Court, and the certificate he received from the Mississippi court should be taken as what he sought, without having to go back to that court and have the certificate appear in some slightly different form with some extra magic words. This Court should respect the process of the state court—that it acted according to regular procedure. This Court runs no risk of overreaching federal jurisdiction when it pays heed to such explicit state court certification. If there is a problem, it is that of the Mississippi court to resolve for itself. Allenberg should be able to rely on its good faith effort to present the application to the state court

and to rely on the form as approved by this court and set out in the form book as a model. This certificate, therefore, should be sufficient to establish this Court's jurisdiction.

C. ***The Mississippi Statute is a Hybrid of State and Federal Law, and Jurisdiction Exists to Decide the Federal Questions.***

Even if the certificate of the Mississippi Supreme Court not be deemed conclusive on the question of whether the federal issue were adequately presented or decided by the state courts, it is clear that this court will accord such a certificate significant weight. This is especially true in a situation such as that herein where there is a close relationship between the state statute and federal rights under the Commerce Clause.

Under Mississippi law "No foreign corporation transacting business in this state without a certificate of authority shall be permitted to maintain any action, suit or proceeding in any court of this state." Miss. Code 1942 Ann. §5309-239 (1972 Supp.). In the section defining the term "transacting business" the statute states that "a foreign corporation shall not be considered to be transacting business in this state, for the purposes of this chapter, by reason of carrying on in this state any one or more of the following activities: . . . (e) Transacting any business in interstate commerce." Miss. Code 1942 Ann. 5309-221 (1972 Supp.). Consequently, as a matter of state law, if a foreign corporation is transacting any business in interstate commerce, as defined by the Mississippi courts, then it need not have a certificate of authority in order to maintain an action in state courts.

This statutory framework is not totally novel with the state of Mississippi; it is derived in modified form from

the Model Business Corporation Act. *Ross Construction Co. v. U.M.& M. Credit Corp.*, 214 So.2d 822, 826-27 (Miss. 1968); *Parker v. Lin-Co. Producing Co.*, 197 So.2d 228, 230 (Miss. 1967). The exception to the qualification requirement for a foreign corporation when transacting interstate commerce is a legislative response to a constitutional mandate. That is, the interstate commerce exemption embodied in §5309-221(e) is not a purely voluntary exercise of legislative grace by the Mississippi legislature but a constraint imposed on state power by the Commerce Clause of the United States Constitution. Art. I, sec. 8. The right to conduct interstate commerce is guaranteed by the federal constitution, and no state can require a license for carrying out interstate business, absent a Congressional mandate. See, e.g., *Crutcher v. Kentucky*, 141 U.S. 47, 57-58 (1891); *International Textbook Co. v. Pigg*, 217 U.S. 91, 108, 111 (1910); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 291 (1921); *Furst v. Brewster*, 282 U.S. 493, 498 (1931); *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276, 278 & n. 7, 284-85 (1961). The commentary to the Model Business Corporation Act makes clear the constraint imposed on state power by the federal Commerce Clause. Indeed, it specifically cites and discusses *International Textbook Co. v. Pigg*, 217 U.S. 91 (1910) and *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921) as reasons for exempting transactions in interstate commerce.

From this analysis, it would appear that the term "interstate commerce" in the Mississippi law is intended to conform to the federal constitutional concept. Indeed, sitting as a state court in a diversity case that arose after the Mississippi Supreme Court decision in this case, the federal court in northern Mississippi has held that the state law here in question incorporates the federal constitutional concept.

> "In summary, sitting in diversity as a Mississippi Court we have determined that the state intended to and did incorporate a federal standard into state law."

Cone Mills Corp. v. Hurdle, 369 F. Supp. 426, 433 (N.D. Miss. 1974). This view is bolstered by examination of section 5309-312, which indicates the state's intention to adopt the federal standard as its own referent. That section states that "The provisions of this chapter shall apply to commerce with foreign nations and among the several states only in so far as the same may be permitted under the provisions of the Constitution of the United States." This language indicates that Mississippi, when enacting its own law, intended to apply established federal concepts, as used in the Model Act and in *International Textbook* and *Dahnke-Walker*. This is also the express holding of *Cone Mills Corp.*, *supra*. *Cf.* 17 W. Fletcher, *Cyclopedia Corporations* 321 (1960) ("The question of what is interstate commerce is a federal question, and the federal decisions are controlling in state courts.")

Where state law incorporates or makes reference to federal constitutional principles, adequate grounds for exercising this Court's jurisdiction exist. In *State Tax Commission v. Van Cott*, 306 U.S. 511 (1939), a Utah tax statute exempted salaries for services rendered in connection with an essential governmental function. The Utah Court felt constrained by a United States Supreme Court ruling that federal salaries were immune from state taxation and held that the Utah statute did not apply. Subsequent to the Utah court's decision, this Court overruled the immunity case on which the Utah court had relied. This Court then took jurisdiction, finding that the federal question was so intermingled with the interpretation of state law that the adjudication of the state issue could not be made independently of the federal issue.

> "[I]f the state court did in fact intend alternatively to base its decision upon the state statute and upon an immunity it thought granted by the Constitution as interpreted by this Court, these two grounds are so interwoven that we are unable to conclude that the judgment rests upon an independent interpretation of the state law." *Id.* at 514.

Similarly, in this case the federal constitutional principles are so clearly a concern of the Mississippi legislature that interpretation of the Mississippi law must be closely interwoven with the Mississippi Supreme Court's view of the limitations imposed by the Commerce Clause.

In *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942), a unanimous decision of this court, the question was whether a military post exchange came within an exception in the California gasoline tax law for any motor vehicle fuel sold to the United States Government or any department thereof. This Court found that the California statutes incorporated federal law to determine the relationship between post exchanges and the government of the United States; it then proceeded to decide that under federal law post exchanges were arms of the federal government deemed by it essential for the performance of governmental functions. Accordingly, this Court took jurisdiction, decided the federal question, and reversed and remanded to the California courts.

In the present case, finding jurisdiction on the ground of state incorporation of federal law would permit a remand to the Mississippi Supreme Court to determine whether its view of state law would be altered after exposition of the federal law by this Court. This approach was followed not only in *Standard Oil v. Johnson*, *supra*, but also in *Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1 (1950), an FELA case. The Missouri Court denied de-

fendant's claim of *forum non conveniens* on ambiguous grounds. Writing for the majority, Justice Frankfurter noted three possible reasons for the denial of the *forum non conviens* claim: local procedure and the exercise of discretion, which would not involve a federal question; an interpretation of the Privileges and Immunities clause of the federal Constitution; an interpretation of the FELA statute. Despite this ambiguity, the Court took jurisdiction to decide that neither the federal statute nor the federal Constitution required a particular outcome:

> "Therefore, if the Supreme Court of Missouri held as it did because it felt under compulsion of federal law . . . , it should be relieved of that compulsion. It should be freed to decide . . . according to its own local law." 340 U.S. at 5.

The same approach was followed in *Perkins v. Benquet Consolidated Mining Co.*, 342 U.S. 437 (1952). *Cf. Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69 (1946); *United Air Lines v. Mahin*, 410 U.S. 623, 630-32 (1973). The best statement of the rule adopted in *Van Cott, Johnson* and later cases was expressed by Justice Frankfurter:[1]

> ". . . where a decision under state law necessarily involves the construction or validity of federal law the determination of such federal law in the application of state law gives rise to a federal question for review here."

Flournoy v. Wiener, 321 U.S. 253, 272 (1944) (Frankfurter, J. dissenting).

[1] In **United Air Lines v. Mahin**, 410 U.S. 623 (1973), Appellant argued in state court that a state law should be intepreted in a certain way. The Illinois Supreme Court rejected this argument, with two justices feeling unable to accept Appellant's position because of limitations imposed by the
(continued on following page)

Commentators have generally acknowledged that this Court's jurisdiction properly lies where state law incorporates or makes reference to federal law. The editors of an authoritative work on this Court's jurisdiction state the principle as follows:

> "Where the meaning of a state statute depends upon federal law, incorporated by it, a construction of that state statute interpreting federal law, presents a federal question for the Supreme Court and is not a state ground of decision. If this were not the rule, many intepretations of federal law by state courts would not be reviewable by the Supreme Court, and state legislatures could frame statutes in such a way as to preclude review of the constitutionality of their application by the Supreme Court."

Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (Wolfson and Kurland ed.) 180-181 (1951). And *Standard Oil Co. v. Johnson*, *supra*, is used as a principal case in the recently revised edition of a highly respected casebook on federal courts, indicating its continued vitality. Hart and Wechsler's *The Federal Courts and the Federal System* (Bator, Mishkin, Shapiro and Wechsler ed.) 483-89 (1973).

Perhaps the most detailed scholarly treatment of this issue is found in Greene, *Hybrid State Law in the Federal Courts*. 83 Harv. L. Rev. 289, 309-15 (1969). To deter-

(Continued from preceding page.)
Commerce Clause. The Supreme Court agreed to decide the federal question because its disposition might have a determinative impact on the construction of state law. "The possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state law does not create an adequate and independent state ground that relieves this Court of the necessity of considering the federal question." 410 U.S. at 630-31.

mine whether a state law is a "hybrid," with interconnecting state and federal elements, Greene argues that the "touchstone ... is whether the federal law is itself operative in the circumstances of the case—whether Supreme Court jurisdiction could effect the coordination of two coextensive and possibly conflicting obligations." *Id.* at 309. Greene uses an example of a state enactment that seeks to exercise the maximum state power without contravening a federal limitation on state authority. In such a case, a state might adopt the federal limitation as the definition of the power it seeks to exercise. Mississippi seems to have had the federal limitation in mind. *See* section 5309-312. If the state court seemingly decides a state question but inevitably relies on federal precepts, then it is proper to invoke Supreme Court jurisdiction. Green's discussion and cases cited hereinabove would justify this Court's exercising jurisdiction had the state court construed the state statute as Appellant Allenberg sought because of the federal overtones of such statutory construction. It surely must equally be the case that jurisdiction exists where the state court reads a state statute in such a way not to uphold a federal interest but to give too little weight to that federal constitutional interest. "If the state law is a hybrid, it ought to be reviewable in its own right, whether or not a federal question has been separately decided." *Id.* at 312. The hybrid state law issue, therefore, is not an adequate, independent ground barring review of the federal questions in the case; rather it is itself enough of a federal question to be indepently reviewable. *Id.* at 320.

Finding jurisdiction on the basis of the incorporation of federal standards in state law raises the further question for this Court of what issue to decide on the merits. In *Standard Oil Co. v. Johnson*, *supra*, Justice Black acknowledged that if the California court's construction of the state

statute had depended purely on local law, then that construction would have been conclusive; this Court would then have had to determine whether the California statute, as construed and applied, would violate the federal constitution. The approach in *Johnson* obviated the necessity of determining that ultimate issue since the Court construed federal law and remanded to the California court. The ultimate question was deferred until a later stage.

In the present case, a ruling that the Mississippi law was a hybrid, incorporating federal standards, would allow disposition on either a narrow ground as in *Johnson* or on the broader ground. Following *Johnson*, the Court could limit its analysis to whether the transaction was in interstate commerce as that concept has evolved in federal constitutional adjudication. See, *e.g.*, *Dahnke-Walker Milling Co. v. Bondurant*; *Lemke v. Farmers' Grain Co.*, 258 U.S. 50 (1922); *Eureka Pipe Line v. Hallanan*, 257 U.S. 277 (1921). Assuming that this Court would find that interstate commerce in the federal Constitutional sense was involved, as the Court in *Cone Mills* did, it would then be up to the Mississippi Court to determine whether the state statute therefore provided an exemption. See *Cone Mills*. If the state court on remand found the state statute applicable to the present factual situation, denying exemption to Allenberg, this Court on appeal would have to decide the issue whether this type of regulation of interstate commerce was constitutional. Alternatively, this Court could decide the broader issue now—determining on this appeal whether this application of Mississippi law not only involves interstate commerce but constitutes an undue or direct burden on such commerce, making it unconstitutional in its application. Either path is possible, but finding jurisdiction on the hybrid state law basis does allow a decision on the merits on a narrower federal ground. See *generally* Greene, *Hybrid State Law in the Federal Courts*, 83 Harv. L. Rev. 289, 312 n.92 (1969).

D. ***The Federal Question Was Timely Raised By Appellant in the State Court Proceedings.***

In the previous two sections, *amicus* has argued (1) that the Mississippi Supreme Court, through its certificate, has said that it actually considered and decided the federal question and (2) that the Mississippi law is a hybrid, inseparably intermixing federal and state concepts, and therefore a decision interpreting the application of state law herein necessarily involves a federal question. In this section, *amicus* will show as an independent matter that this Court should hold that Appellant Allenberg explicitly presented the federal question in a timely fashion under the circumstances.

Appellee Pittman concedes that Appellant Allenberg specifically and expressly raised the claim pressed here in a petition for rehearing before the Mississippi Supreme Court. Motion to Dismiss or Affirm at 10. Assuming for argument's sake that Appellee is correct in his assertion that the federal question was raised for the first time in the petition for rehearing—a matter disputed by Appellant, by the Mississippi Supreme Court's certificate, and by *amicus'* hybrid law argument—there is still an issue whether raising the federal question at that stage was timely and therefore can support this Court's jurisdiction.

It is true, as Appellee contends, that raising the federal question in a petition for rehearing is generally insufficient to establish federal appellate jurisdiction. *See Stern and Gressman* at 124; Robertson and Kirkham, *Jurisdiction of the Supreme Court of United States* (Wolfson and Kurland ed.) 129 (1951). Nevertheless, it is also true, as Justice Harlan has noted, that the "issue whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question . . ." *Street v. New York*, 394 U.S. 576, 583 (1969). A particular

situation cannot deprive a litigant of a reasonable opportunity to have his federal claim argued and decided. In such circumstances, the general rule about the ineffectiveness of a petition for rehearing must yield and raising the federal question will be timely in the petition for rehearing if that is realistically the earliest opportunity. *See* Robertson and Kirkham, *supra*, at 130.

The early case of *Saunders v. Shaw*, 244 U.S. 317 (1917), illustrates the kind of situation, similar to the present one, where an issue raised in the petition for rehearing was held sufficient to invoke this Court's jurisdiction. Plaintiff sued to enjoin collection of a drainage tax, offering evidence to show his land was outside the levee system and therefore not benefited. Defendant objected, and the trial court excluded the evidence as inadmissible; but for purposes of appeal the proof was put into the record. Defendant declined to cross-examine, maintaining his view that the evidence was inadmissible. The trial court sustained defendant's evidentiary position and ruled for him on the merits, a decision affirmed by the state supreme court. On rehearing, the state supreme court reversed itself, holding for plaintiff and relying on the evidence that his land was not benefited by the levee system and therefore not subject to taxation under the intervening decision in *Myles Salt Co. v. Board of Commissioners*, 239 U.S. 478 (1916). Defendant then sought rehearing on the ground that he had not had an opportunity to challenge plaintiff's evidence on the issue of benefit, but the court denied this rehearing under its traditional limitation to one rehearing.

On appeal to this Court, defendant claimed that his inability to present evidence was a denial of due process that resulted from the state supreme court's decision. For a unanimous Court, Justice Holmes found that juris-

diction had been established. When the trial court ruled plaintiff's proof inadmissible, defendant was under no duty to put in evidence he deemed irrelevant. The due process claim did not arise until the state supreme court's decision, but a denial of rights need not only be by legislation, it can also be in the form of a judicial decision. *Cf. Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 680 (1930) (a violation of due process "is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid . . . state statute.") Justice Holmes observed that defendant raised the constitutional issue at the earliest opportunity, and he did not see what more could have been done.

In the present case, Allenberg sued on its contract in state court. Certainly it could not be expected to raise a constitutional issue in its complaint. It is sheer speculation whether Allenberg could have raised the federal constitutional question on appeal if it had lost in chancery court, for Allenberg's position was sustained at trial. Appellee concedes that "[u]nder Mississippi practice, Allenberg (having won below) was not required to make a . . . delineation of issues raised by the case." Motion to Dismiss or Affirm, at 6. Therefore, only when the Mississippi Supreme Court reversed the trial did Allenberg have an opportunity expressly to point out the federal question involved.[2]

In *Missouri ex rel. Missouri Insurance Co. v. Gehner*, 281 U.S. 313 (1930), a state statute taxing insurance company property allowed deductions for a reserve and unpaid policy claims. The company, in addition, deducted the United States Government bonds it held. The state board of equalization held that the reserve and unpaid claims were subject to state tax, ruling these deductions in violation of the state constitution. The board, however, found that the United States Government bonds were not taxable. On appeal the Missouri Supreme Court held that all assets, including the bonds, were taxable. The company petitioned for rehearing, arguing that the Missouri statute as so construed violated Article I, section 8 of the United States Constitution, which gives Congress the power to borrow money on the credit of the United States. *Id.* at 318-19. A unanimous court (the dissent was on the merits) agreed that the case was properly before the Supreme Court. Acknowledging that it generally will not consider contentions first made in the petition for rehearing, the Court said:

> But here the Company, at the first opportunity, invoked the protection of the federal constitution . . . It could not earlier have assailed the section as violative of the Constitution and laws of the United States. The board of equalization completely eliminated the bonds from its calculation . . . It may not reasonably be held that the Company was bound to anticipate such a construction ***or in advance to invoke federal protection against the taxation of its United States bonds.***"

Id. at 320 (emphasis supplied).

Gehner and the case here under review are very similar from a jurisdictional perspective. Structurally, the power to borrow money comes immediately before the Commerce Clause in the Constitution, and the *Gehner* case involved a limitation on state power that flowed from the implications of the granted federal power. The present case

[2] Of course, the Mississippi Supreme Court's Certificate and the hybrid nature of that state law both indicate that the federal question was in fact considered by the state court in the original appeal. This argument assumes, however, without conceding, that the petition for rehearing was the first time that the state courts were presented in the federal issue. This Allenberg did explicitly and in a timely manner at its first opportunity.

also involves a claim that a grant of federal power operates to curtail the exercise of certain otherwise valid state authority. In *Gehner* the state board upheld the Company's view that the United States bonds were not taxable. Here, the Chancery Court sustained Allenberg's view that it could maintain this action since the transaction was in interstate commerce and exempt from the qualification requirement. In *Gehner*, the state supreme court reversed, finding against the Company, and the Company immediately raised the federal claim in light of that construction. Here, the Mississippi Supreme Court likewise reversed, and Allenberg likewise pressed its federal claim in view of the court's interpretation of state law. In *Gehner*, the Court found that the company could not reasonably be held to anticipate the state supreme court's ruling. Here Allenberg could hardly be expected to anticipate a decision that directly contravened *Dahnke-Walker Milling Co. v. Bondurant*, *supra*, and a host of other precedents. The reasonableness of Allenberg's position is sustained by the similar view expressed by Judge Smith in *Cone Mills Corp. v. Hurdle*, 369 F. Supp. 426 (N.D. Miss. 1974) (Allenberg was also a party in a companion lawsuit). As in *Gehner*, the Court here should hold that it has jurisdiction.

Appellant's position is further supported by another unanimous decision, authored by Justice Cardozo, *Great Northern Ry. Co. v. Sunburst Oil and Refining Co.*, 287 U.S. 358 (1932). That case involved a claim by a shipper that freight rates, approved by a state commission, were excessive. The commission agreed and ordered a retroactive rebate, a procedure permitted under state statute according to prior case law. On appeal by the railroad, the state supreme court overruled its previous decision and held such retroactive rebates impermissible. However, the court sustained the shipper's claim by holding

the overruling prospective only and allowing all claims based on the previous decision. The railroad claimed this resolution violated due process.

This Court, after reciting the general rule, found that raising this claim in the petition for rehearing was sufficient to establish jurisdiction because the railroad could not object to the *prospective* application until the Court made its ruling. *Id.* at 367. Similarly, Appellant herein could not challenge the *effect* of the Mississippi Supreme Court's statutory interpretation until that court actually rendered its decision. But the point was brought to the court's attention in a timely manner at the first opportunity.

It is thus clear that the action of a state supreme court can itself raise federal constitutional questions. *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 680 (1930); *Cole v. Arkansas*, 333 U.S. 196, 201 (1948) (proceedings in state supreme court part of the process of law under which a conviction must stand or fall). And challenge of that action on a petition for rehearing will be deemed timely in such cases. Indeed, under the doctrine of *Corn Products Refining Co. v. Eddy*, 249 U.S. 429, 432 (1919), it may be that the *effect* of state court's action may be sufficient to raise the federal question. But the case for jurisdiction here is even stronger than in *Corn Products* because of the explicit attempt to obtain state court review of its own decision through a petition for rehearing. This presentation, even if in a petition for rehearing, serves the ends of federal-state comity and should be viewed with favor by this Court in cases of this kind. See generally *Beck v. Washington*, 369 U.S. 541, 553 (1962), distinguishing outcome therein from situation where review is sought in petition for rehearing.

II. APPLICATION OF THE MISSISSIPPI STATUTES TO THE PRESENT CIRCUMSTANCES, BARRING APPELLANT FROM EVER MAINTAINING AN ACTION TO ENFORCE A VALID CONTRACT, VIOLATES THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.

Underlying the claim by defendant is a challenge to the very legal and constitutional system under which our national economy has grown and thrived. Defendant, who consciously stands in breach of concededly valid contracts, enlists the aid of this Court in an ignoble scheme. There is not one word in the record to challenge the validity of the contract entered into by Allenberg and Ben E. Pittman. Indeed, the testimony of Pittman is explicit acknowledgment of his signing a contract to deliver his cotton to Allenberg (A-82-85), and the trial court so held. Mississippi law expressly states that failure of a foreign corporation to obtain a certificate of authority "shall not impair the validity of any contract." Miss. Code 1942 Ann. § 5309-239 (1972 Supp.).

Rather, defendant-appellee, who intentionally seeks to trammel on the trust and fair-dealing (A-64) of Appellant, unabashedly requests this Court to ignore a four-square binding precedent, as the Mississippi Supreme Court did below. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921). Defendant, who appears in this Court with the unclean hands of a contract breacher, has the effrontery straight-facedly to urge this Court to uphold his claim because of the State of Mississippi's alleged interest in protecting against fraud. This is nothing but bald dissimulation. Unheeding of his own long-run interests, insensitive to the dire hardships imposed on others, unconcerned about the impact on federal policy, and uninhibited by considerations of fidelity to an integrated national marketplace,

defendant asks this Court to overrule, or re-interpret, explicit precedent in order to support his position.

The *Dahnke-Walker* doctrine, however, is as valid today as it was in 1921. As a matter of law, it stands on a solid foundation, and as a matter of policy this is an inappropriate case in which to erode its holding. *Dahnke-Walker* held that a state cannot require a foreign corporation to qualify to do business when transacting interstate commerce, and "[t]he purchase of goods by a foreign corporation for shipment to another state constitutes interstate commerce, and the commerce includes the purchase quite as much as it does the transportation." 17 W. Fletcher, *Cyclopedia Corporations* 373-74 (1960) (footnotes omitted). *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 290 (1921). The principle established protects interstate commerce from parochial state regulations that could fragment the national marketplace; it guarantees that no state can "impede an out-of-state seller's access to the state market . . ." *Eli Lilly and Co. v. Sav-on-Drugs*, 366 U.S. 276, 284 (1961) (Harlan, J., concurring). Under *Dahnke-Walker*, states are unable to require registration, certification or licensure as a precondition for transacting interstate commerce. That rule is as sound today as it was in 1921.

This doctrine has stood the test of time and spawned widespread development of commercial relationships in reliance on it. Only under the most compelling or equitable circumstances should it be eroded. *Cf. Flood v. Kuhn*, 407 U.S. 258 (1972); *State Bd. of Insurance v. Todd Shipyards*, 370 U.S. 451, 456-57 (1962); *Davis v. Dept. of Labor*, 317 U.S. 249, 258-59 (1942) (Frankfurter, J., concurring). Congress has adopted terminology similar to that in *Dahnke-Walker* with specific reference to cotton, 7 U.S.C. § 2101, § 1341. And indeed the regulatory scheme of the Model Business Corporation Act, from which the

Mississippi laws are adopted, *Ross Construction Co. v. V.U.M. and M. Credit Corp.*, 214 So. 2d 822, 826-27 (1968), responds to the regulatory framework and limitations established in *Dahnke-Walker*, exempting interstate transactions from state qualification requirements. See, Model Business Corporation Act Annot. 2d ed. § 106 (and comment 4.05); § 124 (1971). Actually, since the decision in *Dahnke-Walker*, the severe penalty imposed for failure to qualify—inability to maintain an action in a state court—has become less important as this court has narrowed due process limitations on obtaining service of process and jurisdiction on foreign corporations. See *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945) (enunciation of minimum contacts doctrine); Note, *Foreign Corporations: The Interrelation of Jurisdiction and Qualification*, 33 Ind. L. J. 358, 376 (1958).

Also, the Mississippi penalty statute here under review, Miss. Code 1942 Ann. § 5309-239, is an especially draconian regulation since, unlike the Model Act, it does not incorporate a curative provision. Section 124 of the Model Act bars a foreign corporation from maintaining an action "until such corporation shall have obtained a certificate of authority." But Mississippi declined to include that saving feature in its adaptation of the Model Act. Under the Model Act, Allenberg could maintain this action because it obtained a certificate of authority to do business in Mississippi shortly after the Mississippi Supreme Court's ruling in this case. Motion to Dismiss or Affirm at B-12.

Under Mississippi law a foreign corporation is precluded from suing to enforce a contract right unless it had qualified to do business at the time of the transaction. *Cone Mills Corp. v. Hurdle*, 369 F. Supp. 426, 432 (N.D. Miss. 1974); *Parker v. Lin-Co Producing Co.*, 197 So.

2d 228, 230 (Miss. 1967). Thus, Allenberg's good faith effort at compliance is unavailing here. While this Court has upheld statutes denying access to state courts by foreign corporations in cases where intrastate activities were involved, *Eli Lilly and Co. v. Sav-on-Drugs*, 366 U.S. 276 (1961), and where the company has localized its business operations so as to be indistinguishable from a domestic corporation, *Union Brokerage Co. v. Jensen*, 322 U.S. 202 (1944), the consequences of those decisions were mitigated because both New Jersey, 366 U.S. at 277, and Minnesota, *Union Brokerage Co. v. Jensen*, 9 N.W. 2d 721, 724 (Minn. 1943), had saving provisions, allowing suit upon subsequent qualification. Moreover, within the past five years or so, this Court has recognized the fundamental nature of a party's access to a judicial forum. See, *e.g.*, *Boddie v. Connecticut*, 401 U.S. 371 (1971). This recognition underscores the significant effect the penalty provision has and its interference with interests this Court has deemed of basic importance.

The Mississippi penalty is therefore unusually and unnecessarily severe and presents an especially poor case for retrenchment from the *Dahnke-Walker* standard. In Mississippi, retroactive modification of *Dahnke-Walker* would be extraordinarily disruptive, *Cone Mills v. Hurdle*, 369 F. Supp. at 429 and reward breachers of valid contracts with windfall pecuniary gain at the expense of those who in good faith relied on settled judicial doctrine, which indirectly had the imprimatur of Congress in its cotton legislation and of the draftsmen of the Model Business Corporation Act. This result would be especially infelicitous since the state of Mississippi's interests are now adequately served by broad jurisdictional legislation, described *infra*.

Moreover, withdrawal of a judicial remedy for a foreign corporation trying to enforce a contract made in interstate commerce may promote dubious extra-judicial acitivity. A non-qualified foreign corporation under Mississippi law can defend a lawsuit; it just cannot maintain one. As a result, were a prospective purchaser by self-help to gain possession of the goods contracted for it would have the legal authority to retain them under the terms of the contract in defending a suit. This means that in the present case, if Allenberg had resorted to self-help to gain possession of Pittman's cotton, perhaps removing the picked cotton from temporary storage ricks on the farm, Allenberg could have asserted its legal rights under the contract. This Court has indicated its unwillingness to promote extra-judicial self-help remedies in commercial transactions, but upholding the Mississippi court herein would bring about that result. *Cf. Mitchell v. W. T. Grant Co.*, 42 U.S.L.W. 4671, 4677 (U.S. May 13, 1974).

While this Court undoubtedly can and often has reviewed constitutional doctrine in light of experience or an altered historic environment, *Mitchell v. W. T. Grant Co.*, 42 U.S.L.W. 4671, 4682 (U.S. May 13, 1974) (Stewart, J., dissenting), it has been "loath" to overturn Commerce Clause cases which have set a pattern of commercial practice, explicitly or implicitly accepted by Congress and relied on by the commercial interests involved. See *Flood v. Kuhn*, 407 U.S. 258, 283-84 (1972); *State Bd. of Insurance v. Todd Shipyards*, 370 U.S. 451, 457 (1962). This Court should be particularly wary of overturning a course of trade that has proven so successful, and is so vital to a smooth functioning market in cotton and other raw agricultural commodities. Chief Justice Burger, in deferring to a forum selection clause in an international contract, pointedly has observed that the expansion of American business "will hardly be encouraged" if "solemn

contracts" are not given effect by the courts. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972). This deference to precedent is all the more warranted when the equities of the specific case are taken into account. This contract

> "was made in an arm's-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts . . . There are compelling reasons why a freely negotiated private international [or interstate] agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here, should be given full effect."

M/S Bremen v. Zapata Off-Shore Co., 407 U.S. at 12-13.

The claim by Appellee Pittman is hardly the compelling circumstance that would justify wholesale re-examination or erosion of the *Dahnke-Walker* rationale. On the contrary, developments subsequent to *Dahnke-Walker* reinforce the wisdom of its doctrine in facilitating commerce while encouraging states to promote their legitimate interests in less intrusive ways. Accordingly, because it is sound and because no adequate reasons for re-evaluation exist, this Court should be guided by its venerable precedent.[3]

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[3] Amicus recognizes that Dahnke-Walker was decided in an era when substantive due process was at its peak. This Court recently has rejected that approach particularly in areas of economics and welfare. See North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 42 U.S.L.W. 4035, 4038-39 (U.S. December 5, 1973); Ferguson v. Skrupa, 372 U.S. 726 (1963). But this disavowal of earlier substantive due process cases does not control Commerce Clause precedents. The Court has allowed greater leeway for state activity under the police power where the actions involve intrastate affairs than when the federal interest in interstate commerce is involved. See Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 529 (1959); Compare Powell v. Pennsylvania, 127 U.S. 678 (1888)

(Continued on following page)

A. *Mississippi's Regulation of Foreign Corporations*

Several observations about the Mississippi statutory framework are germane. First, as previously noted, the Mississippi corporate statutes are based generally on the Model Business Corporation Act. Section 5309-239, the penalty provision regarding transacting business without a certificate of authority, draws heavily from section 124 (formerly section 117) of the Model Business Corporation Act; but there is one major and extremely significant difference: the Model Act has an explicit curative provision so that a foreign corporation is barred from maintaining an action only until such time as it obtains a certificate of authority. The Mississippi statute disallows subsequent cure by qualifying to do business (see *Cone Mills Corp. v. Hurdle*, 369 F. Supp. at 431-32; *Parker v. Lin-Co Producing Co.*, 197 So.2d 228, 230 (Miss. 1967); obviously the chilling effect and possible disruption of such a provision on the free flow of interstate commerce is strikingly acute.

Second, the exception, when interstate commerce is being transacted, to the certificate of authority requirement is a legislative response to a constitutional mandate. That is, "it would be unrealistic to conclude the interstate commerce exception was enacted as a voluntary exercise of legislative grace. It is a recognition of a constraint imposed upon state power by the Commerce Clause."

(Continued from preceding page)

(Due Process Clause does not bar state from prohibiting production and sale of oleomargarine) with Schollenberger v. Pennsylvania, 171 U.S. 1, 15-17 (1898) (Commerce Clause bars state from prohibiting the flow of uncolored oleomargarine into the state from another state). This reflects both the different character of the federal interest in due process and commerce cases and the concomitantly different role necessarily played by the Court in these kinds of cases. See Southern Pacific Co. v. Arizona, 325 U.S. 761, 767 (1945).

Cone Mills Corp. v. Hurdle, 369 F. Supp. at 432. Section 5309-221(e) derives from and was enacted to satisfy a constitutional duty not to impose preconditions on a foreign corporation's access to local markets in transacting interstate commerce. This point is further elaborated, with citations, in the section on jurisdiction over hybrid state laws.

Third, the severe penalty section in the Model Business Corporation Act, and the even more stringent penalty provision in the Mississippi Act, barring access to state courts to non-qualified foreign corporations, are "designed to enable Mississippi citizens to seek necessary judicial redress locally by encouraging 'foreign' corporations transacting business in Mississippi to make themselves amenable to process in this state." *Cone Mills Corp. v. Hurdle*, 369 F. Supp. at 431. This rather severe penalty for not qualifying can only be understood in light of early doctrines governing personal jurisdiction over foreign corporations.

Traditionally, there have been two bases of personal jurisdiction over foreign corporations: actual consent, normally manifested by compliance with a state qualification statute; and engaging in sufficient activity within the state to establish a jurisdictional basis. Note, *Foreign Corporations: The Interrelation of Jurisdiction and Qualification*, 33 Ind. L.J. 358 (1958). It was quite understandable why states would impose heavy sanctions on foreign corporations which did not obtain a certificate of authority (and thereby qualify to do business); such qualification subjected foreign corporations to state jurisdiction through consent. A foreign corporation could choose not to qualify, but the severe penalty in case it guessed wrong —not being able to maintain an action in state courts— was an incentive to qualify and thereby subject itself comprehensively to state jurisdiction.

This rationale sheds light on the reason for these penalty provisions. They were not designed as vehicles for windfall gain for fortunate defendants, but rather as means for subjecting foreign corporations to suit and accountability in the courts of the state. Viewed in this light, the customary inclusion of a currative provision becomes understandable since the state's objective is corporate responsibility to the citizens of the state, not abrogation of legitimate obligations by state residents to foreign corporations.

This Court's decision in *Internationl Shoe Co. v. State of Washington*, 326 U.S. 310 (1945) discarded the "doing business—presence or implied consent" rationale for jurisdiction "and its mechanistic determinations in favor of a more flexible and realistic jurisdictional basis of reasonableness in view of the activity within the state." Note, *Foreign Corporations: The Interrelation of Jurisdiction and Qualification*, 33 Ind. L.J. 358, 373 (1958). Chief Justice Stone described "certain minimum contacts" within the state "such that the maintenance of suit does not offend 'traditional notions of fair play and substantial justice.'" 326 U.S. at 316. Relevant factors included the character of the corporation's activities and not just their quantity.

In the subsequent case of *Perkins v. Benquet Consolidated Mining Co.*, 342 U.S. 437 (1952), this Court indicated an expansion in the constitutionally permissible extent of state jurisdiction over a non-qualified foreign corporation. *International Shoe* reduced the limitations on the *basis* of and *Perkins* reduced the limitations on the *extent* of jurisdiction over non-qualified foreign corporations, and these jurisdictional criteria are now embodied in the *Restatement 2d of Conflict of Laws*. See sections 42, 52, and 43-51. They are also reflected in the jurisdictional and service of process statutes of Mississippi.

Mississippi corporate law allows service of process on foreign corporations even if they have not qualified to do business in the state. Section 5309-230 provides for service of process on foreign corporations that are authorized to transact business, but the last sentence notes that "Nothing herein contained shall limit or affect the right to serve any process, notice or demand, required or permitted by law to be served upon a corporation in any other manner now or hereafter permitted by law." And § 5345 states that "Any corporation claiming existence under the laws of any other state ..., found doing business in this state, shall be subject to suit here to the same extent that corporations of this state are...." Section 5346 then sets out the basis for service of process on foreign corporations which do not qualify to do business in Mississippi pursuant to 5309-221, -225, and -226. Section 5346 provides in pertinent part as follows:

> Process may be served upon any agent of such foreign corporation found within the county where the suit is brought, no matter what character of agent such person may be; and in the absence of an agent, it shall be sufficient to serve the process upon any person, if found within the county where the suit is brought, who represented the corporation at the time of the transaction out of which the suit arises took place, or if the agency through which the transaction was had be itself a corporation, then upon any agent of that corporation upon whom process might have been served if it were the defendant.

In the instant case plaintiff was represented in its dealings with all defendants herein by a Mr. Hayward Covington. Mr. Covington has a residence in Marks, Mississippi, and by the terms of § 5346 plaintiff Allenberg could have been served, in case of any breach on its part, through

service on Mr. Covington. Section 5346 is perfectly adequate to assure cotton growers their day in court in case of a prospective breach by a cotton purchaser. See also § 1437, Mississippi's long arm statute. The supposed protection against fraud embodied in § 5309-239, the bar to access to Mississippi courts, is quite clearly overkill in the context of the cotton producer/cotton purchaser relationship. Section 5346 offers a much less intrusive means of protecting Mississippi farmers against fraud by foreign corporate purchasers.

The diminished limitations on the exercise of state jurisdiction over foreign corporations have spawned vastly expanded jurisdictional statutes not only in Mississippi but elsewhere, as reflected by the 1971 edition, Restatement 2d of Conflicts. It is therefore fair to conclude that

> "insofar as qualification sought jurisdiction through actual consent and sought to induce compliance by a negative, self-enforcing, no-suit sanction, the present rules and the results thereunder are without reason. A non-complying foreign corporation is denied access to the courts through the application of a no-suit sanction on the ground that by its failure to qualify it has not made itself available to the local forum. But in truth, if the state or a private party plaintiff sought to bring an action against the corporation, jurisdiction could be had . . . The result is that defendants to actions brought by corporate plaintiffs are often relieved of their just obligations, a result that should be permitted only if necessary to serve a greater public interest. Such justification is lacking now and perhaps always has been."

Note, *Foreign Corporations: The Interrelation of Jurisdiction and Qualification*, 33 Ind. L.J. 358, 376 (1958).

The existence of a satisfactory alternative to the penalty provision—an alternative which has a much less harmful effect on interstate commerce and does not chill such commerce—is relevant in determining the constitutional validity of the Mississippi statute in this case. See generally *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970) (The extent of the burden on interstate commerce that will be tolerated depends in part on whether the state's interests "could be promoted as well with a lesser impact on interstate activities."); *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951) (Economic barriers to interstate commerce cannot be erected under the police power "if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available.")

The existence of alternate means of protecting against fraud, by serving process on a foreign corporation's agent, or through the long-arm statute, highlights exactly what is at stake in this litigation. Defendant seeks not to vindicate the interests of the state in guarding against fraud. That is a masquerade, a smokescreen, a sham. Defendant, rather, risks undermining the national system of commerce so necessary to the economic welfare of the nation, not for the noble purpose of defending the interests of Mississippians against overreaching foreign corporations but for self-aggrandizement, pure and simple. There is and can be no inference of wrongdoing on the part of plaintiff in this transaction; but if defendant should claim some grievance against plaintiff, he has his remedy in the courts of the state of Mississippi pursuant to § 5345 and § 5346 or § 1437. Clearly, it is not a fair day in court that defendant seeks but rather an absolute roadblock to an impartial hearing on the merits. Indeed, on that hearing on the merits, the trial court has already ruled against defendant. This is not protection against fraud; it is sheer venality.

B. *The Issues Under the Commerce Clause*

The Commerce Clause has long been viewed as a major source of federal power. Since the days of the New Deal, the courts have found increasingly broad Congressional authority to protect and promote an integrated national market. See, *e.g.*, *National Labor Relations Board v. Jones &Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Wickard v. Filburn*, 317 U.S. 111 (1942); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964). But as this Court noted in *Wickard*, it was Chief Justice John Marshall who described the federal commerce power with a "breadth never yet exceeded." 317 U.S. at 120. It was Marshall who held an organic concept of commerce, and that view has held pre-eminence for at least thirty-five years. *Cf. United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533, 547 (1944) (Insurance contracts, though local in nature, are part of a "chain of events which becomes interstate commerce.")

That the Commerce Clause grants extensive power to the federal government, however, has not precluded all state exercise of regulation that might have some bearing on commerce. Since the decision in *Wilson v. Black-Bird Creek Marsh Co.*, 27 U.S. 245 (1829), this Court has recognized that there is some room for legitimate state regulatory power, even where there is an incidental effect on interstate commerce. See *Cooley v. Board of Port Wardens*, 53 U.S. 299 (1851). Of course, where Congress chooses to exercise its authority, inconsistent state legislation affecting commerce must fall. See generally *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 (1945). But even in the absence of Congressional action, state legislation will be held invalid under the negative implication of the Commerce Clause where there

is a need for national uniformity or where the burden on commerce is direct or substantial. See *Cooley*; *Southern Pacific*, *Pike v. Bruce Church*, 397 U.S. 137 (1970). As the Court stated in *Southern Pacific*, 325 U.S. at 769:

> For a hundred years it has been accepted constitutional doctrine that the Commerce Clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the Commerce Clause the final arbiter of the competing demands of state and national interests.

See *also Freeman v. Hewit*, 329 U.S. 249, 252 (1946).

In analyzing any particular state statute in light of the Commerce Clause, the Court will examine both the nature and the effect of the burden on commerce. *Southern Pacific*, 325 U.S. at 770; *Pike*, 397 U.S. at 145. It will determine whether Congress has spoken on the issue since "Congress has the undoubted power to redefine the distribution of power over interstate commerce." *Southern Pacific*, 325 U.S. at 769; *cf. Union Brokerage Co. v. Jensen*, 322 U.S. 202, 209 (1944). It will determine whether uniformity of regulation is necessary, for if it is then state power must yield. See *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959). It will examine the existence of alternatives available to the states that have a lesser impact on interstate commerce. See *Pike*, 397 U.S. at 14; *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951); *Parker v. Brown*, 317 U.S. 341, 367 (1943) (state's measure "appropriate to the end sought"); *Duckworth v. Arkansas*, 314 U.S. 390, 393, 396 (1941) (statute "reasonably necessary" to achieve state's goals). And finally, even if the effect of the state law on commerce is

only incidental, the Court will balance the local and national interests at stake and if compelling allow the state law to stand. *Pike* at 146.

1. *Analytical Framework*

It should be clear that a basic threshold question in the Commerce Clause analysis is the existence of interstate commerce in the federal constitutional sense. Under Commerce Clause doctrine, however, the existence of interstate commerce does not of itself end the analysis since some state laws can have an effect on commerce and still pass constitutional muster. See, *e.g.*, *Huron Cement Co. v. Detroit*, 362 U.S. 44 (1960). A second analytical step is therefore necessary before a statute can be declared either constitutional or unconstitutional under the Commerce Clause.

The Mississippi statute establishes an exemption for transactions in interstate commerce to the general qualification requirement for foreign corporations. Miss. Code 1942 Ann. §5309-221(e). In the section on jurisdiction, *amicus* has argued that the Mississippi law is a hybrid, incorporating the federal constitutional definition of interstate commerce into state law. This view was adopted by the federal district court in *Cone Mills Corp. v. Hurdle*, 369 F. Supp. 426, 432 (N.D. Miss. 1974). Under this approach, it would be appropriate for this Court to decide only the narrow question whether the transaction involved is in interstate commerce. A finding here that interstate commerce is involved would dictate a reversal, with the possibility of a remand to allow the Mississippi Court to re-construe the statute in light of this Court's guidance on the federal constitutional meaning of interstate commerce. *Cf. Perkins v. Benquet Consolidated Mining Co.*, 342 U.S. 437 (1952); *United Air Lines v.*

Mahin, 410 U.S. 623, 630-31 (1973). In *Cone Mills Corp.*, Judge Smith concluded that the state law incorporated the federal concept of interstate commerce; he independently found that Allenberg (a plaintiff in a case consolidated with *Cone Mills Corp.*) conducted its cotton merchandising business in interstate commerce, and found as a matter of state law that Allenberg was therefore exempt from the qualification requirement under Mississippi law. This Court could likewise restrict its analysis at this time to the question whether this transaction was in interstate commerce, without reaching the ultimate question whether such interference transgressed the power of the state as limited by the Commerce Clause.

2. *Defining Interstate Commerce Under Article I, Section 8*

The threshold question in Commerce Clause cases is whether or not the subject of regulation involves or affects interstate or foreign commerce. This is true both when the issue is Congressional power and state police power. If a given activity is in intrastate commerce and has no effect on interstate commerce, then the federal government has no legislative authority pursuant to the Commerce Clause or the necessary and proper clause. For this reason, the courts since at least 1937, when the *Jones and Laughlin Steel* case was decided, 301 U.S. 1 (1937), have consistently construed the scope of interstate activity and concern broadly. In a country whose economic prosperity has depended on the preservation of a smooth national market, unencumbered by localized barriers to the flow of trade, it is axiomatic that the scope of federal power must be pervasive. Especially in a highly industrialized and interdependent economy, the need for defining federal

commerce interests broadly is critical.[4]

At least since the time of *Swift and Co. v. United States*, 196 U.S. 375 (1905), a federal antitrust action against a meatpackers' conspiracy, the Supreme Court has recognized that activities nominally conducted within a single state can have a significant impact on interstate commerce and are therefore subject to federal regulation. *Cf. Houston East and West Ry. v. United States*, 234 U.S. 342 (1914) (*Shreveport Rate Case*). And in *Chicago Board of Trade v. Olsen*, 262 U.S. 1, 40 (1923), in upholding the validity of the Grain Futures Act, the Supreme Court noted the importance of the question of price in trade among the states: "Sales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it." *Cf. Lemke v. Farmers' Grain Co.*, 258 U.S. 50 (1922).

Perhaps the most graphic illustration of the Court's concern with aggregate effects is the case of *Wickard v. Filburn*, 317 U.S. 111 (1942), which upheld the application of the Agricultural Adjustment Act of 1938 to home-grown and home-consumed wheat. Pursuant to the Act, federal authorities regulated production of wheat even if intended for consumption on the producer's farm. Subjected to a penalty for producing wheat in excess of the quota allotted to him, appellee claimed that his crop was not within the

[4]Perhaps no single piece of federal legislation so clearly indicates the modern economic interdependencies as the wage and price controls under which this country lived for the past two years. These national regulations cover in minute detail what at one time might have been considered purely local activities. The reason for such comprehensive regulations at the national level is that inflation nationwide can be affected by economic activity at all levels. Aggregate demand and aggregate supply have a determinative impact on the national marketplace, and therefore the individual elements of the national market, taken collectively, have a nationwide effect.

reach of federal power because it was consumed on his farm. The Court held that the home-consumed crop could be regulated by Congress, finding that a home-consumed product like wheat has an effect upon the price and market conditions for wheat. Even if never marketed, it supplies a need of the producer that would otherwise be met by purchases in the market. "Home-grown wheat in this sense competes with wheat in commerce." 317 U.S. at 128. To similar effect is *United States v. Wrightwood Dairy Company*, 315 U.S. 110 (1942), wherein this Court upheld a federal regulation of the price of milk produced and sold entirely within Illinois. *Cf. United States v. Rock Royal Co-op*, 307 U.S. 533, 568-569 (1939).

The importance of allowing broad Congressional authority over commerce cannot be stressed too greatly. Yet, if in a situation such as this case, where the question is the validity of a state law, the Court defines the scope of the Commerce Clause interests narrowly, then it must also at the same time necessarily circumscribe Congressional power. Since Congress can only regulate activities in or that affect interstate and foreign commerce, a finding that no interstate commerce is involved or affected implicitly means that Congressional regulatory power is somewhat diminished. But the broad federal regulatory activity with regard to farm products—legislation consistently upheld by the courts—indicates the paramount federal concern with raw agricultural production and marketing, an interest that is threatened by the lower court's action herein.

At this point it will be helpful to review some of the specific characteristics of the cotton industry. The cotton market is a "complex of interrelated, economic forces and institutional facilities which in operation serves to equate the demand for and the supply of cotton in terms

of prices." A. Cox, *Cotton: Demand, Supply, Merchandising* 1 (1953). The various local trading units and cotton exchanges are not self-contained markets but part of an overall cotton marketing system. *Id.* The relevant area for defining the cotton market is the territory over which the economic forces and institutional facilities operate to establish effective price competition. "The area of the market for cotton is world-wide, though the facilities for effecting the bulk of the transactions are located in a comparatively few well-known exchanges with world-wide memberships and wire connections." *Id.* at 1-2. Because the costs of communication and transportation are relatively low, there is international competition in the world marketplace and a "definite price relationship" among all units of the world market. Thus, it can be accurately concluded that there is a "world price and world market for all cotton as well as for each major growth (such as American)." *Id.* at 2.

In recognition of the organic nature of interstate commerce and of the need to define interstate commerce as a dynamic process, both Congress and the Supreme Court have given their approval to the "stream of commerce" concept. For example in the Packers and Stockyards Act, Congress defined interstate commerce as follows:

> ...[A] transaction in respect to any article shall be considered to be in commerce if such article is part of that current of commerce usual in the livestock and meatpacking industries, whereby livestock [et al] ... are sent from one State with the expectation that they will end their transit, after purchase, in another, including ... all cases where purchase or sale is either for shipment to another State, or for slaughter of livestock within the State and the shipment outside the State of the products resulting from such slaughter.

7 U.S.C. §183. In *Stafford v. Wallace*, 258 U.S. 495 (1922), the Supreme Court upheld the Act, relying upon the stream of commerce concept as developed in *Swift and Co. v. United States*, 196 U.S. 375 (1905). See *also Lemke v. Farmers' Grain Co.*, 258 U.S. 50 (1922); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921); *Eureka Pipe Line v. Hallanan*, 257 U.S. 277 (1921).

A similar broad view is reflected in the Congressional definition of interstate commerce in the Commodity Exchange Act 7 U.S.C. §3, which is an almost identical restatement of the definition contained in the Packers and Stockyard Act. But of most direct significance to the issues in the instant case is the very recent Congressional declaration of policy with specific reference to cotton, in the Cotton Research and Promotion Act, 7 U.S.C. §2101:

> Cotton is the basic natural fiber of the Nation. It is produced by many individual cottongrowers throughout the various cotton-producing States of the Nation. *Cotton moves in large part in the channels of interstate and foreign commerce and such cotton which does not move in such channels directly burdens or affects interstate commerce in cotton and cotton products. All cotton produced in the United States is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects interstate or foreign commerce in cotton or cotton products.* The efficient production of cotton and the maintenance and expansion of existing markets and the development of new or improved markets and uses is vital to the welfare of cottongrowers and those concerned with marketing, using, and processing cotton as well as the general economy of the Nation. (Emphasis supplied).

This explicit Congressional finding that all cotton produced in the United States is in interstate commerce or directly affects it is a reaffirmation of the realities of the cotton trade as described by Professor Cox in his previously quoted work.[5] As the Supreme Court has often stated, this Congressional statement is entitled to great judicial deference, see *e.g.*, *Southern Pacific Co. v. Arizona*, *supra*. In *Cone Mills Corp.*, *supra*, the Court specifically found that "[t]here is no significant amount of cotton milling in Mississippi .... As a practical matter in the cotton industry, Mississippi cotton almost invariably has an out-of-state destination." 369 F. Supp. at 436.

The principles of defining interstate commerce that have evolved in deciding the scope of federal power have likewise been applied by the courts in cases like the present one where the negative implications of the Commerce Clause are at issue. That the standards for determining whether interstate commerce is involved are interrelated regardless of whether the question arises in the context of a federal statute or a state law is made clear by cross-citations. For example, in *United States v. Rock Royal Co-op*, 307 U.S. 533 (1939), a challenge to the validity of a federal regulation of the price of milk sold within a state, the Court rejected the contention that Congress was powerless to regulate such a local transaction. Specifically citing *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 290, 291 (1921) and *Lemke v. Farmers' Grain Co.*, 258 U.S. 50, 54 (1922), cases invalidating state laws as

[5] As a legislative finding, Congress has also determined that "American cotton is a basic source of clothing and industrial products used by every person in the United States and by a substantial number of people in foreign countries. American cotton is sold on a world-wide market and moves from the places of production almost entirely in interstate and foreign commerce to processing establishments located throughout the world ...." 7 U.S.C. §1341.

violations of the Commerce Clause, the Supreme Court in *Rock Royal* held that interstate commerce was involved since "where commodities are bought for use beyond state lines, the sale is part of interstate commerce." 307 U.S. at 568-69 & n. 38. When interstate commerce was found, federal power followed.

The Supreme Court's decision in *Dahnke-Walker* on the interstate commerce issue is directly on point here and should be controlling. In the present case Allenberg, a cotton merchant, contracted with the defendant through a local agent for the delivery of cotton at the time of harvest. Under the terms of the contract and pursuant to the normal course of dealing, the picked cotton would be ginned, separating the seed and the hull from the cotton, and pressed into bales. Under the terms of the contract, the cotton is then to be placed in a warehouse, which would issue a negotiable warehouse receipt. The seller then would deliver the warehouse receipt and the U.S.D.A. classification cards to the local broker, who would pay the farmer and draw a draft on a Memphis bank for reimbursement (A-53, 68). Samples of the bales of cotton were to be sent by the farmer both to the U.S. Department of Agriculture for classification and to Allenberg at its office in Memphis (A-7). Under the contract, if there is a delay in the process of issuing the negotiable receipt, then the responsibility for paying warehouse charges remains with the seller. This means that the risk of loss stays with the seller until the receipt is transferred to Allenberg, or until the cotton is invoiced to Allenberg (A-7, ¶4).

The cotton bought by Allenberg in Mississippi, including Pittman's cotton, was *all* purchased for shipment outside of Mississippi (A-78, 79, 96). The cotton purchased by Allenberg from Pittman had already been obligated by Allenberg to customers outside of Mississippi before this

contract had been entered into. The Pittman cotton, indeed, was purchased for the purpose of satisfying part of this obligation (A-79). The contract with Pittman was typical in this regard of Allenberg's normal course of dealing. All cotton purchased by Allenberg was shipped in interstate commerce and obligated prior to the transaction to customers outside of Mississippi. It thus had an ascertainable destination out of state at the time the contract was made; "according to the general practice of the industry, the commodity became a part of interstate commerce when it was purchased by Allenberg." *Cone Mills Corp., supra*, 369 F. Supp. at 436-37.

In *Dahnke-Walker* a Tennessee corporation contracted with a Kentucky farmer for the purchase of wheat through a locally resident agent. Delivery of the wheat and payment were both to take place in Kentucky, and nothing was stated expressly in the contract about the ultimate destination of the wheat although *Dahnke-Walker* intended to use it in its mill located in Tennessee. Since the Tennessee corporation had made other purchases of wheat in Kentucky, the transaction was not a single isolated deal but part of a course of trade.

As in the instant case, the farmer in *Dahnke-Walker* claimed that the transaction was not in interstate commerce. The Kentucky court sustained that view, finding that the activity was intrastate commerce; it therefore held the contract unenforceable by the Tennessee corporation, which had not qualified to do business in Kentucky. On appeal the United States Supreme Court reversed, holding that the transaction was in interstate commerce. It is noteworthy that this Court heard reargument in the *Dahnke-Walker* case, and decided a similar issue on that same day in *Eureka Pipe Line Co. v. Hallanan*, 257 U.S. 265 (1921),

so it is clear that the Court gave special attention to the important issue confronting it.

The facts and holding in *Dahnke-Walker* are on all fours with the instant case. The Supreme Court expressly stated that interstate commerce is "not confined to transportation from one state to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse." 257 U.S. at 290. That organic view of interstate commerce as a dynamic process has been the predominant understanding of the concept and has been followed undeviatingly since 1937. See *Bruhn's Freezer Meats v. United States Department of Agriculture*, 438 F.2d 1332, 1339-40 (8th Cir. 1971). The Court in *Dahnke-Walker* went on to hold, 257 U.S. at 290-91:

> Where goods in one state are transported into another for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. [citations omitted] On the same principle, *where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation* . . .
>
> . . . In no case has the court made any distinction between buying and selling or between buying for transportation to another state and transporting for sale in another state. Quite to the contrary, the import of the decisions has been that, if the transportation was incidental to buying or selling, it was not material whether it came first or last. (Emphasis supplied.)

The *Dahnke-Walker* standard for determining interstate commerce was followed in *Lemke v. Farmers' Grain Co.*, 258 U.S. 50 (1922), where the Court invalidated a compre-

hensive North Dakota regulatory scheme for the purchase of locally produced grain. Purchasers of grain in North Dakota bought with the intent of shipping for resale in Minnesota. The Court found that this out-of-state shipment was the general course of business in the grain trade, 258 U.S. at 42, much as shipment of cotton out of Mississippi is the usual course of business in the cotton trade. Citing *Dahnke-Walker*, the Court in *Lemke* said: "That such course of dealing constitutes interstate commerce, there can be no question." *Id.* The Court reached this conclusion even though it conceded that the grain could have been diverted to a local market; it was enough for the Court that such was not the ordinary course of business. *Id.* at 55. *Cf. Eureka Pipe Line Co. v. Hallanan*, 257 U.S. 265, 272 (1921).

In *Shafer v. Farmers' Grain Co.*, 268 U.S. 189 (1925), the Court invalidated a new North Dakota law regulating grain transactions. The Court noted that the buyers made and executed contracts within the state, but that the wheat was purchased for shipment out of state as soon as grain accumulated in carload lots. Finding that wheat was an article of commerce and the "subject of dealings that are nation-wide," the Court concluded that "[b]uying for shipment, and shipping, to markets in other States when conducted as before shown constitutes interstate commerce—*the buying being as much a part of it as the shipping.*" (Emphasis supplied) 268 U.S. at 198. Similarly, purchasers of cotton in Mississippi, in the ordinary course of their business, intend to ship outside the state, and in this case Allenberg expected to ship out of state as soon after acquiring the legal ability to do so as possible.

In *Furst v. Brewster*, 282 U.S. 493 (1931), the Court gave further meaning to its interpretation of interstate commerce. Invalidating a statute which operated much

like the Mississippi statute in the present case, the Supreme Court held that every negotiation, contract, trade, and dealing between citizens of different states, which contemplates and causes the importation from one state to another, whether of goods, persons, or information, is a transaction in interstate commerce. *Id.* at 497-98. It is clear that Allenberg contemplated the shipment of the cotton it bought from Mississippi to its out-of-state customers at the time of purchase and customarily effectuated that interstate movement at the earliest possible time.

Subsequent decisions by this Court have reaffirmed the breadth of the interstate commerce concept. For example, in *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944), the Court found that insurance transactions constituted interstate commerce:

> "We may grant that a contract of insurance, considered as a thing apart from negotiation and execution, does not itself constitute interstate commerce .... But it does not follow from this that the Court is powerless to examine the entire transaction, of which that contract is but a part, in order to determine whether there may be a chain of events which becomes interstate commerce ... In short, a nationwide business is not deprived of its interstate character merely because it is built upon sales contracts which are local in nature. Were the rule otherwise, few businesses could be said to be engaged in interstate commerce."

322 U.S. at 547. While *South-Eastern Underwriters* involved interpretation of federal antitrust legislation, its decision on the interstate commerce issue very clearly was intended to apply as a limitation on state power. *Furst v. Brewster, supra*, one of the progeny of *Dahnke-Walker*, was approvingly cited, 322 U.S. at 547 n. 26,

and Chief Justice Stone pointed out that the majority holding did not find Congressional power because of the effect on commerce but because "the contracts are themselves interstate commerce." 322 U.S. at 570 (Stone, C.J., dissenting). The later case of *State Bd. of Insurance v. Todd Shipyards*, 370 U.S. 451, 452 (1962), expressly affirmed the previous finding that the modern business of insurance is "interstate commerce," with the implications that that holding had as a limitation on state power. *Cf. Flood v. Kuhn*, 407 U.S. 258, 282 (1972) ("Professional baseball is a business and it is engaged in interstate commerce.")

And, in *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949), the Court invalidated a New York milk licensure law because of the effect it had on interstate commerce. Noting that "[o]ur system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation," the Court concluded no foreign state through statute or regulation can exclude such a person. "Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any." 336 U.S. at 539.

The modern rule, developed from the cases discussed, is that where one purchases goods in one state for transportation to another, the interstate commerce transaction includes the purchase as well as the transportation. If the transportation is incidental to the buying or selling, it is immaterial whether the transportation takes place before or after the sale or whether delivery for transportation is made to a common carrier, a private carrier, or to the purchaser for transportation himself. Thus, for example, when a seller of meat delivers to a purchaser at the plant,

and the purchaser is to promptly transport the meat across state lines, the sale itself is part of interstate commerce. See *Bruhn's Freezer Meats v. United States Department of Agriculture*, 438 F.2d 1332, 1339-40 (8th Cir. 1971). The Eighth Circuit's decision in *Bruhn's Freezer Meats* cites approvingly and relies heavily on both *United States v. Rock Royal Co-op*, 307 U.S. 533, 568-69 (1938) and *Dahnke-Walker*, indicating the continued vitality of the interstate commerce concept as expressed in those cases.

The negotiations in this case, where the contract is part of interstate commerce, are themselves interstate commerce. 17 W. Fletcher, *Cyclopedia Corporations* 318 (1960). And "the character of commerce does not depend upon the place of final ratification of the contract." *Id.* at 320. Indeed, Fletcher, far from negating the principle in *Dahnke-Walker*, often restates its holding. For example, he says that "[i]t is well settled that constitutional and statutory provisions regulating the doing of business in the state by foreign corporations do not apply to transactions in interstate commerce . . .," citing *Dahnke-Walker*. 17 W. Fletcher, *Cyclopedia Corporations* 589-99 and n. 72 (1960). He notes elsewhere that the qualification statutes "are not applicable to foreign corporations engaged in interstate or foreign commerce . . ., for if construed as applicable to such corporations, the statutes would be unconstitutional." *Id.* at 504. And, citing *Sioux Remedy Co. v. Cope*, 235 U.S. 197 (1914) and *International Textbook Co. v. Pigg*, 217 U.S. 91 (1910), Fletcher concludes that with isolated exceptions a "foreign corporation cannot be denied the right to sue nor can conditions be imposed on the right to sue, on a cause of action based on a transaction involving interstate commerce . . ." *Id.* at 405 and n. 45.[6]

[6]Fletcher at one point states that qualification statutes do not apply to foreign corporations doing interstate commerce. Then citing Union Broker-

(Continued on following page)

Appellee's Motion to Dismiss or Affirm, at page 13, quotes a portion of section 8415, to the effect that a purchase is not interstate commerce where the transaction is complete before interstate commerce begins. But Appellee picks and chooses with remarkable discernment which sentences of that section to cite. He omits the immediately prior sentence, two subsequent sentences, and some relevant footnotes. The full section reads as follows:

> "The purchase of goods by a foreign corporation for shipment to another state constitutes interstate commerce,[48] and the commerce includes the purchase quite as well as it does the transportation.[49] A mere purchase in the state, however, without a shipment outside the state, does not constitute interstate commerce,[50] and a purchase is not one in interstate commerce where the transportation is complete before interstate commerce begins, and the purchase makes no provision as to shipment to the foreign corporation outside the state.[51] If there is no intention to take the property outside the state, or to resell it outside the state, the transaction is not one in interstate commerce,[52] although it is immaterial that a small portion of the goods is actually resold within the state."[53] The regular course of business of the foreign corporation, in connection with such purchases, as to shipment of purchases outside the state, fixes and determines the interstate character of the transaction.[54] The mere fact that the purchase is

(Continued from preceding page)

age Co. v. Jensen, 322 U.S. 202 (1944), he notes that "there are indications that interstate commerce may no longer serve as a barrier to qualification." 17 W. Fletcher, Cyclopedia Corporations 387 (1960). This statement reflects the understandable ambiguity left by Union Brokerage case, discussed infra, but it was written before this court's clarifying decision and limitation of that case in Eli Lilly and Co. v. Sav-on-Drugs, 366 U.S. 276 (1961).

> f.o.b. cars in the state does not prevent the purchase from being one in interstate commerce.[55] Purchases in the state by a branch office of the foreign corporation are not transactions in interstate commerce.[56]

Thus, Fletcher recognizes, citing *Shafer*, that the purchase of goods by Allenberg for shipment out of Mississippi is interstate commerce, and the commerce includes the purchase as well as the actual transportation. In support of this proposition, Fletcher cites *Dahnke-Walker* as "a leading case on this question." 17 W. Fletcher, *Cyclopedia Corporations* 374 n. 491 (1960). Fletcher also notes, as the court in *Cone Mills Corp.* did, that the regular pattern of business practice with regard to such purchases determines the interstate character of the entire transaction, citing *Lemke*. 17 Fletcher at 376 and n. 54. And the intention of the purchaser at the time of the purchase to make resales outside the state is controlling on the question of interstate commerce. *Id.* at 375 nn. 51 and 52. *Cf. Sprout v. South Bend*, 277 U.S. 163, 168 (1928). (In determining whether a transaction is in interstate commerce, "[t]he actual facts govern. For this purpose, the destination of the passenger when he begins his journey and known to the carrier, determines the character of the commerce.") The record here shows that all Allenberg's cotton purchases were for interstate resale (A-96). And, as the court found in *Cone Mills Corp.*, and as reported by the U.S. Department of Agriculture, virtually all of the cotton grown in Mississippi is shipped out of state. *U.S.D.A. Supp. for 1972 to Bulletin No. 417 - Statistics on Cotton and Related Data* 1930-1967, pp. 58, 77. *Cf. Lemke v. Farmers' Grain Co.*, 258 U.S. 50, 53-55 (1922). The course of trade is thus clear; the intent of the purchaser is established; and at least the constructive notice of the seller is manifest since virtually all cotton produced

in Mississippi is shipped in interstate commerce. From the totality of the circumstances, there can be but one conclusion: the entire transaction was in the stream of interstate commerce—negotiation, purchase, sale and shipment. This is the reality of the trade, as recognized by Congress for many years, by this court long ago, by the federal court on the scene in Mississippi, and by the trial court herein.

Despite the overwhelming authority for defining interstate commerce as a dynamic process that includes all the component elements of an interstate transaction—an almost uniform holding at least since the decision in 1937 in *Jones & Laughlin Steel*—there may be some question of the relevancy of two state taxation cases decided in 1934. *Chassaniol v. City of Greenwood*, 291 U.S. 584 (1934) (occupation tax on every person engaged in the business of buying or selling cotton for himself within the city); *Federal Compress Co. v. McLean*, 291 U.S. 17 (1934) (state excise tax on operating a cotton compress).

In *Pike v. Bruce Church*, 397 U.S. 137, 141 (1970), the Supreme Court indicated that the basis for the holdings in *Federal Compress* and *Chassaniol* was unclear. Speaking for a unanimous Court, Justice Stewart observed that the decisions could be construed as holding that the activities taxed took place before interstate commerce began, or they could be seen as deciding that the burden upon commerce was at the most indirect and remote. Justice Stewart went on to find that the actions of Arizona in *Pike* affected interstate commerce, regardless of the view taken of *Federal Compress* and *Chassaniol*.

In light of subsequent developments in Commerce Clause doctrine, it is probably wiser to view those cases as holding that there was a burden on interstate commerce, but

that the burden was indirect and therefore not unconstitutional. This is the second alternative articulated by Justice Stewart in *Pike* and would conform more nearly to subsequent Commerce Clause developments after *Jones and Laughlin Steel*. But facts of the instant case are distinguishable even assuming the continued vitality of the "mechanical test" of *Federal Compress* and *Chassaniol*. See *generally Parker v. Brown*, 317 U.S. 341, 360-61 (1943).

In *Townsend v. Yeomans*, 301 U.S. 441 (1937), in which regulations on the handling and selling of tobacco were upheld, the Court clearly indicated that the regulation affected commerce but found the burden indirect and thus constitutional. Nevertheless, the Court drew an analogy to *Federal Compress* and *Chassaniol* because the warehouses were regulated in their dealings with the farmers but not in their dealings with buyers from out of state to whom the warehousemen sold tobacco. 301 U.S. at 457-58. *Federal Compress* and *Chassaniol*, thus are better understood as cases in which indirect burdens on interstate commerce were upheld. *Cf. Pike*, 397 U.S. at 141.

Of course, whether or not the effect of any particular burden on interstate commerce is direct and therefore unconstitutional requires the court to weigh competing interests and values. But the modern Commerce Clause cases such as *Wickard v. Filburn*, *supra*, *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) and *Katzenback v. McClung*, 379 U.S. 294 (1964), indicate that a restrictive interpretation of the scope of the federal commerce interest is inconsistent with prevailing understanding and realities. *Cf. Perez v. United States*, 402 U.S. 146 (1971) (Upheld power of Congress in Consumer Credit Protection Act to forbid extortionate extension of credit.) A conclusion that interstate commerce was not involved

in the transactions herein would directly conflict with Congressional findings which are entitled to great judicial deference. See *State Bd. of Insurance v. Todd Shipyards*, 370 U.S. 451, 456 (1962). Besides, such a view would ignore the subsequent developments in the area of state taxation. Recent tax cases make it clear that a state has the power to impose a tax on interstate commercial activities provided that the tax is not discriminating against interstate commerce and not excessive in relation to the governmental benefit conferred by the state. See *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959). That is, the state can require interstate commerce to bear its fair share of the tax burden, but the tax must have a rational relationship to the value of the governmental services conferred. *Evansville-Vanderburgh Airport Authority District v. Delta Air Lines*, 405 U.S. 707, 715-16 (1972).

In *United Air Lines, Inc. v. Mahin*, 410 U.S. 623 (1973), the Supreme Court upheld the constitutionality of an Illinois general revenue use tax as applied to aviation fuel stored in Illinois and then loaded aboard aircraft there and consumed in interstate flight. Relying on two 1933 taxation cases, *Edelman v. Boeing Air Transport, Inc.*, 289 U.S. 249 (1933), and *Nashville, Chattanooga and St. Louis R. Co. v. Wallace*, 288 U.S. 249 (1933), Justice Blackmun drew a distinction between a state tax on consumption of fuel, which would be impermissible as a direct burden on interstate commerce, and the Illinois tax on storage and withdrawal of fuel, which "does not place an unconstitutional burden on interstate commerce." 410 U.S. at 629. Importantly, the Court recognized that both kinds of taxation affected interstate commerce, but concluded that the tax on consumption was excessively burdensome because of the risk of multistate taxation of interstate commerce.

Thus, in *United Air Lines* the Court viewed *Edelman* and *Nashville* as cases involving an indirect and remote burden on interstate commerce. Contra: *Southern Pacific Co. v. Gallagher*, 306 U.S. 167, 176 (1939). Yet these two cases certainly lend themselves to the same analytical ambiguity as *Federal Compress* and *Chassaniol*. That is, they can be seen either as holding that the tax was on intra state commerce or constituted an indirect burden on interstate commerce. The modern and analytically preferable approach is to interpret the scope of interstate commerce broadly and then to determine whether the effect on such commerce is excessively burdensome. See *Evco v. Jones*, 409 U.S. 91 (1972).

Language in *Federal Compress* itself indicates that the balancing approach was the one employed by Justice Stone. He noted that property withdrawn from transportation, "whether intrastate or interstate, until restored to a transportation movement interstate, has often been held subject to local taxation." 291 U.S. at 21. He concluded that the privilege tax created an indirect and remote burden on interstate commerce and therefore did not transgress constitutional limitations. 291 U.S. at 22. *Cf. Edelman*, 289 U.S. at 252; *Nashville*, 288 U.S. at 267. It is this balancing analysis that most nearly conforms to the subsequent developments in Commerce Clause jurisprudence and should be applied herein, despite some admittedly confusing references to taxation of intrastate activity in *Federal Compress*, *Chassaniol*, *Edelman* and *Nashville*. In *United Air Lines* Justice Blackmun acknowledged that this area of state taxation law is cloudy and complicated, but he went on to attribute this primarily to "the varied nature of interstate activities" which make line drawing difficult. 410 U.S. at 629. From that statement, it would appear that this Court now views the early state

tax cases as involving or affecting interstate commerce but not so directly or burdensomely as to be unconstitutional.

Moreover, tax cases raise somewhat different and specialized issues. See *Lemke v. Farmers' Grain Co.*, 258 U.S. 50, 55 (1922). Interstate commerce is not immunized from bearing its fair share of taxation, provided the tax is non-discriminatory and equitably apportioned. See B. Schwartz, *Constitutional Law* 121-22 (1972); *Cf. Eli Lilly & Co. v. Sav-on-Drugs, Inc.*, 366 U.S. 276, 289 (1961) (Douglas, J., dissenting); *Evansville-Vanderburgh Airport Authority*, *supra*; *United Air Lines*, *supra*. As the Court has said, the state has a legitimate and important interest in securing revenue from activities that derive govermentally conferred benefits. At the same time, the Court will be vigilant to minimize the danger of double taxation of interstate commerce. The objective is to achieve fiscal fairness so that businesses contribute for the maintenance of such governmental services as police and fire protection, maintenance of access roads, and maintenance of instrumentalities of interstate commerce. See *United Air Lines*; *Evansville-Vanderburgh Airport Authority*. Since taxation is the only means of raising revenue, state taxation cases are somewhat *sui generis* and must be decided on an *ad hoc* basis. Even in the taxation area, however, Justice Frankfurter often warned of the potential dangers of state intrusion on federal interests. For example, in *Freeman v. Hewit*, 329 U.S. 249 (1946), in determining the limitations on a state income tax, the Court found an impediment on the "currents of commerce across the State line, while the aim of the Commerce Clause was precisely to prevent States from exacting toll from those engaged in national commerce." 329 U.S. at 254. Yet in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), the Court upheld a fairly apportioned tax concededly on interstate activities..

These tax cases reflect the difficulty the Court has had in accommodating state revenue interests with federal interests in preserving an integrated national marketplace. See *Freeman v. Hewit*, 329 U.S. at 252. The states have legitimate claims on interstate commerce to pay its fair share of local costs, and governmental revenue, for better or worse, must derive from some form of taxation. Local interests are therefore served only when revenue can be collected (though there are of course different types of taxation), and this then brings about the delicate balancing this Court has undertaken: to minimize the danger of double or excessive taxation while simultaneously allowing the states a source of revenue "having a relation to the event taxed." *United Air Lines v. Mahin*, 410 U.S. at 630. The goal is to achieve a "fair result."

In this section, *amicus* is urging that the transaction involved herein be declared in interstate commerce. The question whether this is then an undue burden on commerce is addressed in the next section. While the tax cases are decided within a Commerce Clause framework, the outcome often turns on different factors, enumerated above *Federal Compress* and *Chassaniol* must be viewed with these considerations in mind.[7]

[7]It is instructive in this regard to examine the concurring opinions of Justice Harlan in **Northwestern States Portland Cement Co. v. Minnesota**, 358 U.S. 450, 468 (1959) (Harlan, J. concurring) and **Eli Lilly and Co. v. Sav-on-Drugs, Inc.**, 366 U.S. 276, 284 (1961) (Harlan, J. concurring). **Northwestern Cement** held that a state could constitutionally tax net income from the exclusively interstate operations of a foreign corporation. Justice Harlan's concurrence expressly rejects the view that prior cases allowed state taxation only on interstate business. 358 U.S. at 466. He concluded that this was "both novel doctrine and unreal analysis... because this Court has never held that activities... performed solely in aid of interstate sales, are intrastate Commerce." Id. at 468. In **Eli Lilly**, however, Justice Harlan explicitly noted that the basis for exerting state regulatory authority (qualification to do business) was that the activity of the foreign corporation was localized and wholly separate from interstate commerce. 366 U.S. at 285, 287. His clear understanding is that a qualification requirement for interstate transactions would be unconstitutional, even though a tax might pass muster.

In any event, even assuming the relevance of the tax cases and the ongoing vitality of the "mechanical test" of *Federal Compress* and *Chassaniol*, they are distinguishable on their facts from the situation involved in the present controversy and certainly cannot support the conclusion that the transaction herein was not in or did not affect interstate commerce.

As the court in *Pike* noted, the early Mississippi cases involved cotton that had come to rest in Mississippi, and "[b]efore shipping orders [were] given, it [had] no ascertainable destination without the state." 291 U.S. at 21. In *Pike* Arizona had imposed certain packing standards on cantaloupes grown in the state. The grower, however, sought to send the cantaloupes to its packing plant outside the state, and therefore the Court noted that they "were destined to be shipped to an ascertainable location in California immediately upon harvest." 397 U.S. at 141. Likewise, Allenberg bought the cotton here in question for the purpose of shipping it to its customers without the state of Mississippi. Justice Stewart's citation of *Lemke* and *Shafer* in support of his conclusion indicates the Court's continued reliance on their view of interstate commerce.

Not only didn't the cotton in *Federal Compress* and *Chassaniol* have an ascertainable destination outside the state at the time the tax was levied, but indeed there had not yet been an interstate transaction of any kind. The Court in *Dahnke-Walker*, *Lemke*, and *Shafer* held that an interstate purchase for transportation across state lines constitutes an interstate transaction, but in *Federal Compress* and *Chassaniol* there had been no interstate sale at the time the tax became due. The Court in *Chassaniol* makes this point explicitly, 291 U.S. at 587:

> Ginning cotton, transporting it to Greenwood, and warehousing, buying and compressing it there, are each,

> like the growing of it, steps *in preparation for the sale* and shipment in interstate or foreign commerce. But each step *prior to the sale* and shipment is a transaction local to Mississippi . . .
> (Emphasis supplied)

The critical significance of this distinction is made manifest in *Parker v. Brown*, 317 U.S. 341 (1943), where the Court applied the "mechanical test" of *Chassaniol* to a California statute that restricted the marketing of raisins. The Court observed that a state could tax a sale where the purchaser ultimately intended to resell in interstate commerce if the original transaction were itself intrastate. That is, the Court found that no case had held that a state could not regulate the sale of an article within the state because the buyer, after processing and packing would sell and ship that article in interstate commerce. Importantly, however, the Court in *Parker* noted that before the packing and processing of raisins they were not in the stream of commerce. On this very basis, the Court distinguished *Lemke* and *Shafer*, as the Court subsequently did in *Pike*, on the ground that the regulation in those cases was of purchasers of grain within the state for immediate shipment out of state without resale or processing. For that reason the purchase itself in *Lemke* and *Shafer* was a part of commerce. 317 U.S. at 361. Similarly, the contracts in the instant situation expressly identify Allenberg as the purchaser. The forward contract between defendant and Allenberg was itself a transaction in interstate commerce, and it was clear that Allenberg, the purchaser, was going to transport the cotton into another state as soon as practicable after it obtained legal possession. There was no processing in Mississippi while the cotton was in Allenberg's possession; users of Mississippi cotton are almost invariably located outside of Mississippi. Even if ginning and compressing be deemed

processing, that was carried out before delivery of the cotton to Allenberg and therefore was not carried out by it or under its supervision. (A-7, ¶3). Moreover, from the outset the cotton has a destination outside Mississippi, and that location became specifically ascertainable as soon as the grade and staple length of the cotton were determined by government classifiers. For these reasons, the situation in the present case is distinguishable from *Federal Compress* and *Chassaniol*. See *Cone Mills Corp.*, 369 F. Supp. at 436-37.

There may also be some question of the relevance of the recent decision in *Kosydar v. National Cash Register Co.*, 42 U.S.L.W. 4767 (U.S. May 20, 1974), which involved the validity of a state taxation statute under the Import-Export Clause, Article I, §10, clause 2. *Kosydar* represents both the differences between Commerce Clause and Import-Export Clause analysis and the differences between taxation and regulatory measures.

Justice Stewart in *Kosydar* recognized that by its terms the prohibition on state taxation contained in the Import-Export Clause is absolute: "no duties or imports are allowed 'except what may be absolutely necessary for executing [a state's] inspection laws.'" 42 U.S.L.W. at 4768. A conclusion that a commodity has entered the stream of export thereby immunizes it automatically from state taxation. The Import-Export Clause is designed to promote uniformity throughout the nation. Thus, even Congress is constrained by Article I, §8, Clause 1 to impose duties and imports uniformly throughout the country. This uniformity is important to prevent unwanted competition among states and to enable the United States to present a united front in foreign trade affairs. In *Kosydar* the Court granted certiorari "because the case involved important questions touching the accommodation of state and

federal interests under the Constitution." 42 U.S.L.W. at 4768. It is understandable, then, that given the absolute prohibition on state taxation imposed by the Import-Export Clause, the Court would be extremely sensitive to the need to narrow the definition of "export" so as to protect only those federal interests underlying the clause.

For this reason, imposition of a strict threshold test for determining when a commodity enters the stream of export is appropriate. A broader interpretation necessarily would mean rigid limitations on state revenue raising powers, and as Justice Frankfurter noted, the purpose of the Import-Export Clause was "not to relieve property eventually to be exported from its share of the cost of local services." *Joy Oil Co. v. State Tax Commission*, 337 U.S. 286, 288 (1949), cited in *Kosydar*, 42 U.S.L.W. at 4769-70. No similar absolute rule exists with respect to interstate commerce. State power with an indirect effect on commerce has long been held constitutional, *Pike v. Bruce Church*, 397 U.S. 137 (1970), and states are constitutionally entitled to tax net revenues derived from interstate business, provided they are fairly apportioned, not discriminatory and not excessive. See *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959). Moreover, federal interests in commerce are broader, and it is reasonable that threshold definitions of interstate commerce will be broader, especially since the impact of such a finding is not generally conclusive in limiting state power.

Kosydar, like *Federal Compress* and *Chassaniol*, is a taxation, not a regulation case. National Cash Register has its corporate headquarters in Dayton, Ohio and the warehouse was located there as well. To a great degree

it had localized its business and drew heavily on the services of the community. *Cf. Union Brokerage Co. v. Jensen*, 322 U.S. 202 (1944). As Justice Blackmun pointed out in *United Air Lines v. Mahin*, *supra*, a state has a substantial interest in securing revenue for service rendered to a corporation, and allowance of the Ohio state tax in *Kosydar* would not defeat the federal interest in uniformity nor discriminate against exports.

An analogous issue could arise if the case under review involved an attempt by Mississippi to tax Pittman's cotton while in its possession at the compress. It might be a reasonable and equitable accommodation of federal and state interests if such a tax were exacted (though Mississippi specifically exempts cotton in the possession of producers from personal property taxation for a period of two years subsequent to harvest). (Miss. Code 1942 Ann. §9697 (i).) But that is not what is involved in this case. Rather the question is the enforceability through suit of an admittedly valid contract. The comparable situation in *Kosydar* would be the following: the foreign corporation negotiates a deal with National Cash Register (NCR); an officer of the foreign corporation flies to this country to close the deal by signing a contract at NCR's headquarters in Dayton, Ohio for delivery of the contracted machines nine months hence; because it can sell its machines to another prospective customer at a higher price, NCR refuses to deliver and claims that the foreign corporation, which had not qualified to do business in Ohio *at the time the contract was signed*, cannot maintain an action on its otherwise valid contract. Statement of the above case demonstrates the very different considerations in a tax case like *Kosydar* and those involved herein. It is almost inconceivable that this Court would deny the foreign corporation in *Kosydar* access to an American

judicial forum to enforce the contract in the previous hypothetical. For the same reasons, the ability of Allenberg to sue on its contract should now be vindicated.

Although the Supreme Court's decision in *Eli Lilly Co. v. Sav-on-Drugs, Inc.*, 366 U.S. 276 (1961), is characterized by such a different factual situation from the case herein, some mention should be made of that ruling because the underlying issues bear similarity. In *Lilly* the Court upheld the application of a New Jersey statute that required a foreign corporation doing interstate business to obtain a certificate of authority in order to maintain an action in a state court. Lilly, an Indiana corporation dealing in pharmaceutical products, manufactures and sells these products in interstate commerce to certain selected wholesalers in New Jersey. These wholesalers then sell the Lilly products in intrastate commerce to New Jersey hospitals, physicians, and retail drug stores, and these retail stores in turn sell them, again in intrastate commerce to the general public. 366 U.S. at 278. Lilly operated an office in New Jersey with eighteen "detailmen", whose job it was to visit retail pharmacists, physicians and hospitals in order to acquaint them with the products of the company and to encourage them to use Lilly's products. These detailmen serve a promotional function and sometimes even take an order but in all cases the ultimate sales to the customers visited by the detailmen are made by the wholesalers who have bought from Lilly.

The facts of *Lilly* are so strong that the majority found that "[t]o hold . . . that plaintiff [Lilly] is not doing business in New Jersey is to completely ignore reality." 366 U.S. at 280.[8] Nevertheless, four justices dissented on

[8]Note, however, that New Jersey's qualification statute, unlike Mississippi's had a saving provision for subsequent qualification.

even those strong facts for fear of inhibiting a robust flow of interstate commerce. Furthermore, Justice Harlan, concurring, expressly stipulated that if Lilly were to fill directly the orders drummed up by its detailmen that that activity would be interstate commerce and not subject to state regulation or licensure. 366 U.S. at 286. But the promotional function performed by the Lilly detailmen involved them deeply in the everyday intrastate commerce of the state of New Jersey, and the Court held that the state was under those circumstances entitled to require the corporation to qualify to do business if it were to maintain an action in state court.

The facts of the instant case are hardly comparable to those in *Lilly*. Allenberg is an out of state corporation that was purchasing cotton by forward contract with cotton growers for sale to customers all located outside the state of Mississippi. Allenberg did not employ a sales force to promote intrastate sales of its products, and its entire function is the promotion of and facilitation of interstate commerce in cotton. Its activity is hardly localized in Mississippi and the factual reality more nearly comports with Justice Harlan's statement in *Lilly* that a foreign corporation need not qualify when selling directly interstate.

Justice Holmes once remarked that "interstate commerce is a practical conception." *Eureka Pipe Line v. Hallanan*, 257 U.S. 265, 272 (1921). As a practical matter and also as a matter of principle, the totality of the circumstances shows that the transactions in the instant case were in interstate commerce and significantly affected such commerce. The consequences of any other holding herein would risk the most serious curtailment of federal interests in an area in which federal regulation has been pervasive and deemed necessary to safeguard national concerns in

agricultural marketing. The facts, as stated by Congress in 7 U.S.C. §2101, indicate that interstate commerce is involved, and controlling Supreme Court precedent in *Dahnke-Walker* and subsequent cases supports this view.

C. *Determining the Validity of §5309-221 and §5309-239 Under the Commerce Clause*

Once the court concludes that the transactions involved in this case were in or affected interstate commerce, a constitutional analysis requires a determination whether the state statute as applied has such an insubstantial or indirect effect on such commerce as to withstand scrutiny under the negative force of the Commerce Clause.

1. *As Applied to This Case, §5309-221 and §5309-239 by Their Necessary Operation Unconstitutionally Impose a Direct Effect on Interstate Commerce.*

The Supreme Court's decision in *Dahnke-Walker* is not only determinative on the issue of defining interstate commerce, it is also conclusive with regard to the consequences of a finding that there is interstate commerce. As the Court there held, 257 U.S. at 291:

> A corporation of one state may go into another without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter state which obstructs or lays a burden on the exercise of this privilege is void under the Commerce Clause.

The *Dahnke-Walker* Court noted that the Tennessee corporation had purchased grain in Kentucky at other times and had a prior practice of purchasing for shipment to its plant in Tennessee. The Court found the Kentucky requirement that the Tennessee corporation qualify to do business in Kentucky excessively burdensome on commerce and held that "direct" effect unconstitutional.

The decision in *Dahnke-Walker* relied on well-developed precedent. In the so-called "drummer" cases it had been established that a corporation is entitled to send salesmen

into a foreign state to promote direct interstate trade without interference by regulations imposed by that state. See *Robbins v. Shelby County Taxing District*, 120 U.S. 489 (1887). This principle was forcefully reaffirmed in the majority and concurring opinions in *Lilly*. 366 U.S. at 278-79, 284-85. In *Crutcher v. Kentucky*, 141 U.S. 47 (1891), the statute prohibited an agent of a company, which was not incorporated in Kentucky, from carrying on business without first obtaining a license from the state. The Court struck down the statute holding that a state cannot require a license for carrying on interstate business, unless Congress should see fit to interpose some other regulation on the subject matter. 141 U.S. at 57. The Court in *Crutcher* referred to the standards set out in *Cooley v. Board of Port Wardens*, 53 U.S. 299 (1851), acknowledging that some state police power regulations might be permissible even if they had an indirect effect on commerce, but went on to note that the effect of such regulations must be local in character in order to be sustained. 141 U.S. at 58.

Crutcher was followed in *Western Union Telegraph Co. v. Kansas*, 216 U.S. 1 (1910), where the Court invalidated a statute requiring a foreign corporation to pay a tax in order to do business in Kansas. While recognizing that some type of local regulations affecting commerce might pass muster, 216 U.S. at 26, citing *Cooley*, the Court held that:

> a corporation of one State, authorized by its charter to engage in lawful commerce among the States, may not be prevented by another State from coming into its limits for all the legitimate purposes of such commerce. It may go into the State without obtaining a license from it for the purposes of interstate business . . .

The Court further noted that a benign legislative purpose would not save a statute if by its necessary operation it had an unconstitutional effect on interstate commerce. "If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted . . ." 216 U.S. at 27.

Another Kansas statute was held unconstitutional in 1910. The statute, similar in operation to the Mississippi statute here when viewed narrowly as the Mississippi Supreme Court has done, required a foreign corporation to qualify before doing business in Kansas, and any corporation doing business without authorization could not maintain any action in state court. See *International Textbook Co. v. Pigg*, 217 U.S. 91 (1910).

International Textbook offered correspondence courses from its office in Scranton, Pennsylvania. It had a local traveling agent who procured business and forwarded enrollments to Scranton. The Solicitor in Kansas operated an office there at his own expense. Under the terms of the Kansas statute, International Textbook was found to be doing business. The Court found that the business was in interstate commerce and then proceeded to determine whether the statute by its necessary operation materially or directly burdened International Textbook's interstate business. In analyzing whether the effect was "direct", the Court observed that filing a detailed statement was a condition precedent to authorization for a foreign corporation to do business in Kansas. The statute denied a corporation access to the courts unless it first obtained certification. 217 U.S. at 107-08. The Court concluded that a state is not competent to impose the duty to register on a foreign corporation as a condition precedent. Even

though no formal license was required, the effect was the same: "[I]t imposes a *condition* upon a corporation of another State seeking to do business in Kansas, which in the case of interstate business, is a regulation of interstate commerce and directly burdens such commerce." 217 U.S. at 111. The Court noted that courts serve as an alternative to resolving conflict through force, and if a state cannot require filing it certainly cannot bar access to its courts to a foreign corporation engaged in interstate commerce. *Id.* at 112. *Cf. Mitchell v. W. T. Grant*, 42 U.S.L.W. 4671, 4677 (U.S. May 13, 1974).

In *Sioux Remedy Co. v. Cope*, 235 U.S. 197 (1914), another broad state statute regulating foreign corporations was declared unconstitutional. A South Dakota statute barred foreign corporations from transacting business within the state or from maintaining any action in any state courts until it filed a copy of its charter and designated an agent for purposes of service of process. *Id.* at 200. An Iowa corporation shipped merchandise to a South Dakota corporation under a contract entered into in South Dakota. The state court held that the Iowa corporation could not maintain an action on its contract since it had not subjected itself to the jurisdiction of the South Dakota courts. On appeal this Court addressed the question whether the statute, as construed by the state court, by its necessary operation materially or directly burdened interstate commerce. *Id.* at 200-01. The Court concluded that the right to enforce payment on a contract (or delivery in the case of Allenberg) was so closely related with commerce and so essential to the existence and continuance of such commerce that the imposition of these conditions necessarily constituted a direct restraint on interstate commerce. *Id.* at 202-03. Thus, when a corporation goes into a state to enforce a contract, a state cannot interfere consistent with the Commerce Clause.

> "If it were otherwise, the purpose of the constitution to secure and maintain the freedom of commerce by whomsoever conducted could be largely thwarted by the States and the commerce itself seriously crippled. . . . If one State can impose such a condition others can, and in that way corporations engaged in interstate commerce can be subjected to great embarrassment and serious hazards in the enforcement of contractual rights directly arising out of and connected with such commerce."

235 U.S. 197. *Cf. Adams Express Co. v. New York*, 232 U.S. 14, 31 (1910).

In *Furst v. Brewster*, 282 U.S. 493 (1931), a case decided a decade after *Dahnke-Walker*, the Supreme Court expressly relied on the line of cases just discussed. *Furst* involved an Arkansas statute that denied any foreign corporation the right to sue in state court unless it filed a copy of its articles of incorporation and a financial statement, and designated a local agent upon whom process could be served. Furst was an Illinois corporation which shipped goods from a location in Memphis, Tennessee, to Brewster, who lived in Arkansas. Noting that the ordering and shipping of the goods was interstate commerce, the Court found that "according to established principle," any state statute that imposes a direct burden on interstate commerce is void under the Commerce Clause.

> Accordingly, when a corporation goes into a State other than that of its origin to collect, according to the usual or prevailing methods, the amount which has become due in transactions in interstate commerce, the state cannot, consistently with the Commerce Clause, obstruct the attainment of that purpose.

282 U.S. at 498.

The rule derived from *Furst*, *Dahnke-Walker*, *Sioux Remedy*, *International Textbook*, *Western Union Telegraph*, *Crutcher*, and *Robbins* is that broad licensure and qualification requirements applied to interstate transactions of foreign corporations directly burden interstate commerce by their necessary operation and are therefore in violation of the Commerce Clause. The continuing vitality of that principle was explicitly reaffirmed in the *Lilly* case where, citing *Crutcher*, *International Textbook*, and *Sioux Remedy*, the Supreme Court acknowledged that "[i]t is well established that [a state] cannot require [a foreign corporation] to get a certificate of authority to do business in the State if its participation in this trade is limited to its wholly interstate sales . . ." 366 U.S. at 278 & n. 7. From this it can readily be seen that the interstate commerce exemption contained in §5309-221(e) Miss. Code 1942 Ann., as adapted from the Model Act, is constitutionally mandated. See *Cone Mills Corp. v. Hurdle*, 369 F. Supp. at 432. As a consequence, since the federal constitutional interests shaped the state statutory provision, *cf.* §5309-312 Miss. Code 1942 Ann., these interests must be preserved, even as against restrictive interpretations of state law.

The Supreme Court has acknowledged that by their nature certain kinds of state restrictions constitute almost *per se* violations of the Commerce Clause. See *Pike v. Bruce Church*, 397 U.S. 137, 145 (1970). The conclusion to be drawn from the cases discussed in this section and from the response contained in §124 of the Model Business Corporation Act is that a comprehensive qualification requirement as a condition for maintaining an action in state court, where the action arises out of an interstate transaction, is by its nature a direct burden on interstate commerce because so intimately connected with the right of a foreign corporation to have access to local markets free of local

controls. *Cf. Lilly*, 366 U.S. at 285 (Harlan, J., concurring). SSince, as *amicus* has argued, the underlying transactionss herein were in and affected interstate commerce, it neecessarily follows that the state is not constitutionally peermitted to bar plaintiff from the Mississippi courts to enfforce its concededly valid contracts. By its nature the quualification requirement, as applied to an interstate transacction, necessarily affects interstate commerce "directly" annd is therefore invalid under the Commerce Clause. If iin this situation the qualification requirement is void then tthe bar of access to the courts must also fall. See *Internatidonal Textbook*, 2?7 U.S. at 112.

The previdously discussed cases, however, do not establish that aall state regulation of foreign corporations is invalid. Seee *Lilly* (state can require a foreign corporation to qualify to do intrastate business). Where the state has particulaarized interests, local in character, they can act under the police power, provided that the effect of the state statute iis not such as to materially or directly affect interstate commmerce. The Court's decisions in cases like *Lemke* annd *Shafer*, discussed in the section defining interstate commmerce, reflect the Court's conclusion on an *ad hoc*, caase by case basis of the relative importance of the local veersus the national interests at stake. For example, in *LLemke* and *Shafer* the Court found it determinative that over 90% of the grain produced in North Dakota was shipped iin commerce out of state. For that reason, the impact of the North Dakota regulatory scheme on interstate commercce was significant. Indeed, that factor was seen in a laterr case as a distinguishing characteristic when the Court upheeld a milk regulatory statute in a state where only 10% of thee milk traveled in interstate commerce. See *Milk Conttrol Board v. Eisenberg*, 306 U.S. 346 (1939).

Thus, theree is a significant area of state power, even where state acction might have some indirect and inconse-

quential impact on interstate commerce. However, as the Court stated in *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 780 (1945):

> "The principle that, without controlling Congressional action, a state may not regulate interstate commerce so as substantially to affect its flow or deprive it of needed uniformity in its regulation is not to be avoided by 'simply invoking the convenient apologetics of the police power.'"

The cases that have upheld the exercise of state power examine the character of the local interest involved and weigh local and national interests, sometimes in a frank balancing process. See *Pike*, 397 U.S. at 142; *Southern Pacific*, 325 U.S. at 770-71. But in cases sustaining state legislation, the particular state interest has been defined with great specificity. Thus, in *Huron Cement Co. v. Detroit*, 362 U.S. 440 (1960), the Court held constitutional a city smoke emission ordinance as applied to a ship when docked within the city. The Court found the ordinance an evenhanded regulation and the subject matter of legitimate local public concern, with the impact on interstate commerce not unduly burdensome. *Id.* at 443. Similarly, the Court has sustained local regulation over such specific subject matters as tobacco (*Townsend v. Yeomans*, 301 U.S. 441 (1937)), raisins (*Parker v. Brown*, 317 U.S. 341 (1943)), liquor transportation (*Duckworth v. Arkansas*, 314 U.S. 390 (1941)), interstate transportation (*California v. Thompson*, 313 U.S. 109 (1941)), and sale of insurance (*Robertson v. California*, 328 U.S. 440 (1946)). But in all those situations the state regulation was specifically aimed at a particularized local concern that might not draw the attention of a national legislative body. The state statutes involved were not general state regulatory measures

but narrowly tailored provisions to deal with localized problems relating to an individual industry. And even when such local interests are specifically regulated, the Court will engage in an independent review to weigh the local and national interests. Thus, despite the ruling in *Eisenberg, supra*, and its recognition of the "eccentric" localized character of the milk industry, the Court invalidated a New York milk licensure law because of its undue impact on interstate commerce. *H. P. Hood and Sons, Inc. v. DuMond*, 336 U.S. 525 (1949). Similarly, despite the states' primary and immediate concern with the safety of its highways, that interest cannot subvert the national interest in unencumbered interstate transportation. Compare *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938) with *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959).

The Court's decision in *Union Brokerage Co. v. Jensen*, 322 U.S. 202 (1944) represents both a similar and a different basis for sustaining local regulation. The Minnesota statute there involved was a broad regulatory measure, not the specific, particularized statutes as in the other cases mentioned above. But the Court in *Union Brokerage* noted that Petitioner's customhouse business operated in Minnesota much like any other corporation. It was localized within the state, it bought materials from people in the state, and entered into business relationships "wholly outside of the arrangements it makes with importers or exporters." 322 U.S. at 208. Union Brokerage could be required to qualify to do business for that portion of its operations that were intrastate, and the Court expressly found that it had many "dealings quite outside transactions immediately connected with import and export." *Id.* Since the business was so localized and had to have a wide variety of dealings with the people in the community, the Court found that the state had an interest in regulation

that outweighed the indirect impact of foreign commerce. The decision in *Union Brokerage* can be squared with the Court's ruling subsequently in *Lilly*, in which a general regulatory statute was upheld with respect to intrastate transactions of a foreign corporation.

Moreover, the *Union Brokerage* opinion makes it abundantly clear that where a foreign corporation comes into the state for the purpose of contributing to or concluding a unitary interstate transaction that it would be free of such comprehensive regulatory provisions. To make its point, the Court expressly cited approvingly its previous decisions in *Dahnke-Walker, Sioux Remedy* and *International Textbook*, 322 U.S. at 211. In addition, the *Union Brokerage* opinion placed emphasis on the understanding that the federal government implicitly recognized the legitimacy of and need for local supervision of customhouse brokers. In its regulations, the federal government allowed a customhouse broker in one federal district to transfer to another district provided that it was authorized to do business by the state or states where the other district was situated. For the Court, this was explicit recognition by the federal government of the need for local regulation and authorization of such state action. 322 U.S. at 209. For these reasons *Union Brokerage* is not inconsistent with the rule that comprehensive, general regulatory measures of foreign corporations involved in interstate transactions by their necessary operation have an impermissible substantial and direct effect on commerce.

2. ***The Actual Effect of §5309-221 and 249 as Applied Materially Burdens Interstate Commerce and Local Interests Can Be Promoted By Alternatives Which Affect Interstate Commerce Less Severely.***

Congress has often stated its belief that the market in agricultural commodities is national and even international

in scope. See, e.g., 7 U.S.C. §§3, 1621, 2101, 2301. As previously discussed, this is the view also held by Professor A. B. Cox, an expert on the cotton trade. There are 19 cotton-producing states in this country, and cotton purchasers frequently buy in the vast majority of these states during the course of business. As the Court acknowledged in *Wickard v. Filburn*, *supra*, small alterations in the terms of trade can have significant effects on overall markets. Allowing each cotton-growing state to require cotton purchasers to qualify to do business would put a significant burden on these buyers and make the access to local markets less free. Yet it is the reduction and elimination of artificial barriers to entry that brings about maximum economic efficiency.

Erection of bureaucratic obstacles of red-tape will reduce the numbers of potential purchasers in the market. Also, because of the time lag necessary to process qualification papers, new entrants into the market will be unable to transact business because of the unenforceability of contracts. The result will be that bigger firms may be able and find it worthwhile to qualify to do business, but smaller firms will not. This will mean that the big cotton buyers will have a more concentrated market position with respect to the sellers and will be better able to exercise this power in dealing with the producers. The predictable consequence of such a situation would be an increased concentration among buyers with more market power with respect to sellers. In turn these buyers would have more concentrated power on the national markets. The likely result would be lower prices for farmers in the long run and higher prices for consumers.

That this result is not fanciful gains support from a Congressional committee finding that there is a growing concentration of power in the hands of fewer and larger

buyers. This was the basis on which Congress enacted the Agricultural Fair Practices Act of 1967, 7 U.S.C. §2301 et seq. The Act excluded cotton from its coverage because it concluded that there was sufficiently active competition in that market so that the terms of the Act did not have to cover cotton transactions. See *U.S. Code Cong. & Admin. News*, 1968, p. 1869-70. But that situation could turn around quickly if impediments to free entry were permitted to arise.

Moreover, the Mississippi statute is not drawn with specific reference to cotton fraud. It is not particularized to any localized interest and therefore the national interests in maintaining an efficient private market, see 7 U.S.C. §1621, should prevail. Uniformity of regulation, under the control of a single authority, is vital to the smooth functioning of the marketing system, and local barriers to entry can have only pernicious effects.

In *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), the Chief Justice recognized the importance for international trade of upholding freely bargained for contracts where there is no evidence of fraud or overreaching. Uncertainty about enforcement of contracts and barriers to the judicial forum have the most serious consequences in undermining trade and commerce. 407 U.S. at 13-14. Agricultural commodities provide the United States with a balance of trade surplus on world markets. If this Court gives the green light to states to impose absolute barriers to its courts to foreign corporations to enforce valid contract rights, it will endanger national interests in marketing agricultural commodities.

Moreover, the Mississippi statutes are far from neutral in their impact on foreign corporations. One of the most disfavored forms of state legislation is a statute that discriminates against interstate activity. *Pike v. Bruce*

Church, 397 U.S. 137 (1970). Under the Mississippi law a foreign corporation must already be qualified at the time a transaction is entered into in order to maintain an action. But if such a contract helps the Mississippi party, then it can fully enforce the contract against the foreign corporation. Thus, if this contract had been signed in 1972, when cotton prices fell, and Allenberg had sought to renege, Pittman could have successfully bound Allenberg to the terms of the contract. When the shoe is on the other foot, when the Mississippi resident seeks to renege, the foreign corporation is unable to use the courts at all. Good faith is no defense; fair dealing is irrelevant. The absolute barrier exists in all cases, even when the state's interest is defeated, not promoted, by its enforcement, as herein.

Furthermore, any interest that Mississippi seeks to promote by its qualification requirement and by barring access to its courts could be achieved in ways that have a lesser effect on interstate commerce. Of course, the state has a very important and legitimate interest in protecting against fraud. But prevention of fraud is not a magical incantation that automatically justifies any state enactment no matter what other alternatives are available and no matter how severely the measure in question trammels on other constitutionally protected interests—in this case robust interstate commerce.

For example, this Court has invalidated state application of its qualification requirement when it interfered with basic associational freedoms. *NAACP v. Alabama*, 377 U.S. 288 (1964); *NAACP v. Alabama*, 357 U.S. 449 (1958). As Justice Harlan noted, the registration requirements were designed to ensure that foreign corporations be amenable to suit in state courts so as to protect state citizens from fraud. 377 U.S. at 305. Nevertheless,

not all such regulation is benign when it has significant impacts on federal constitutional interests.

In *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970), the Supreme Court expressly stated that the existence of alternatives which promoted state interests with less impact on commerce were an important consideration under Commerce Clause analysis. To similar effect is *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951), in which the Court held that economic barriers could not stand even under the police power "if reasonable nondiscriminatory alternatives" were available.

By analogy, in *Dunn v. Blumstein*, 405 U.S. 330 (1972), this Court invalidated durational residency requirements for voting despite the claim by Tennessee that they helped combat voter fraud. As Justice Marshall indicated, protection against fraud "is a formidable sounding state interest." Nevertheless, despite the importance of this interest the state could not justify durational residency laws because "such sweeping laws" are not "necessary to prevent fraud." 405 U.S. at 345. That is, they were not the "least drastic means necessary for preventing fraud." 405 U.S. at 353. *Cf. M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972) (an arm's-length negotiation by businessmen should be enforced by the courts "absent some compelling and countervailing reason.")

Similarly, as outlined in an earlier section, Mississippi can achieve its goal of making plaintiff subject to service of process pursuant to §5346 Miss. Code 1942 Ann., which authorizes service on the foreign corporation's agent who transacted business within the state. Or the state could obtain service under the provisions of its long-arm statute, §1437 Miss. Code 1942 Ann. These broader jurisdictional statutes are permissible in wake of developments subse-

quent to *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and, somewhat like registration requirements for voting, serve the function the penalty statutes once might have. And the federal court in Mississippi, *Cone Mills Corp. v. Hurdle*, 369 F. Supp. at 431, and Justice Harlan in *NAACP v. Alabama*, 377 U.S. 288, 305 both have recognized that protection against fraud by subjecting foreign corporations to suit locally is the primary goal of the qualification statutes.

In the present case, as a factual matter, defendant could have gained service on Allenberg by service on its agent living in Marks, Mississippi, under existing Mississippi law. Certainly the availability of that procedure negates the state's interest in protecting against overreaching foreign corporations in the current controversy and makes the potential harmful consequences on interstate commerce unjustifiable.

But even if, for the sake of argument only, one were to conclude that the qualification statute were justifiable, the state would have a burden to justify the failure to include a curative provision in its law as does the Model Business Corporation Act. Certainly that strikes a more equitable balance between the local interests in protecting against fraud and the national interests in interstate commerce. The draftsmen of the Model Act evidently were sensitive to the need to balance these competing values, but the state legislature chose not to give adequate weight to the Commerce Clause values. This was a choice reviewable by this Court, and was a choice that the legislature was not entitled to make in light of the deleterious effects on commerce. If there were a curative provision in the Mississippi law, then plaintiff would be able to maintain this action since it has now qualified to do business in Mississippi. While not conceding that even the qualification

requirement is the least intrusive means of assuring accountability by foreign corporations, *amicus* urges that the lack of a curative provision is at minimum a fatally defective flaw in the Mississippi statute. As a minimal recognition of the critical Commerce Clause values at stake, and of the potential for chilling a substantial amount of interstate commerce, the state is required by the Commerce Clause to allow a foreign corporation to maintain an action if it subsequently subjects itself to the jurisdiction of the state as Allenberg has done here. This gives effect to the basic interests in permitting access to the courts, *Boddie v. Connecticut*, 401 U.S. 371 (1971), in deterring self-help, *Mitchell v. W.T. Grant Co.*, 42 U.S.L.W. 4671, 4677 (U.S. May 13, 1974), in giving effect and certainty to interstate and international commercial transactions, *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), and in subjecting foreign corporations to accountability to Mississippi residents.

When unpacked, defendant's legal argument can be seen for what it is—a high-sounding, but hollow, resort to principle to camouflage the thrust for immediate additional profit and windfall gain. The state's interest in protecting its citizens against overreaching foreign corporations is adequately met here, and so is defendant's interest in maintaining any action against Allenberg. The existence of these safeguards against fraud reveals the underlying foundation for defendant's claim—not prevention against fraud but legalized disobedience of concededly valid contractual agreements. This court should be especially unwilling to lend its support to such a nefarious scheme where the burden falls not only on interstate commerce but on interests outside the state. As Justice Stone recognized, such interests normally cannot protect themselves adequately through the internal political process of a state.

See *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 n. 2 (1945). For that reason, courts should give especial deference to such interests. *United States v. Carolene Products Co.*, 304 U.S. 144, 152-54 n. 4 (1939). *Cf. Gordon v. Lance*, 403 U.S. 1 (1971). Such concern is warranted by the widespread reneging currently occurring on all too many forward cotton contracts.

CONCLUSION

There is no allegation of bad faith on the part of plaintiff, and the state's interests are amply protected by alternatives both actually and potentially available. In light of the nature of the regulation involved and its necessary direct impact on interstate commerce, and in light of the actual effect on such commerce, in light of the alternatives open to defendants and to the state to protect the legitimate local interests claimed, *amicus* urges that Appellant Allenberg be allowed to maintain this action on its concededly valid, freely bargained for contract.

Respectfully submitted,

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